

**The Titles of This Code are
Arranged and Numbered as Follows**

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1947

ANNOTATED

CONTAINING THE PERMANENT LAWS OF THE STATE IN
FORCE AT THE CLOSE OF THE THIRTIETH
LEGISLATIVE ASSEMBLY OF 1947

NINE VOLUMES

COMPILED, REVISED AND ANNOTATED

UNDER CHAPTER 184, LAWS OF 1945 AND CHAPTER 266, LAWS OF 1947,
AND PUBLISHED UNDER CHAPTER 43, LAWS OF 1947

I. W. Choate
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VOLUME 8

Crimes and Criminal Procedure

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DEFINITIONS AND PRELIMINARY PROVISIONS

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✓ **94-101. (10710) Construction of penal statutes.** The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice.

History: En. Sec. 4, Pen. C. 1895; re-en. Sec. 8096, Rev. C. 1907; re-en. Sec. 10710, R. C. M. 1921. Cal. Pen. C. Sec. 4.

Operation and Effect

Under section 12-202 and this section, the rule that statutes in derogation of the common law must be strictly construed does not apply to code provisions (including penal); liberal construction being the rule as to all; hence, prior decisions to the effect that section 15-811, relating to the liability of directors of corporations for the corporations' debts for failure to file an annual report, being penal in character and unknown to the common law, must be strictly construed, overruled. *Continental Supply Co. v. Abell et al.*, 95 M 148, 163, 24 P 2d 133.

Contention that sections 59-518 to 59-520, defining "nepotism" and prohibiting public officers, boards or commissions from

appointing relatives to a position of trust or emolument, and providing punishment by fine and imprisonment in the county jail, should be strictly construed as a penal statute may not be sustained, this section, providing that the common-law rule that penal statutes shall be strictly construed, has no application to the Penal Code. *State ex rel. Kurth et al. v. Grinde et al.*, 96 M 608, 614, 32 P 2d 15.

References

Cited or applied as section 8096, Revised Codes, in *John v. Northern Pacific Ry. Co.*, 42 M 18, 43, 111 P 632; *State v. Penny*, 42 M 118, 123, 111 P 727; *Smith v. Smith*, 224 Fed. 1, 5, 139 C. C. A. 465; *State v. Aldahl*, 106 M 390, 393, 78 P (2d) 935.

Statutes—241 (1).

59 C.J. Statutes § 660.

94-102. (10711) Provisions similar to existing laws, how construed. The provisions of this code, so far as they are the same as existing statutes, must be construed as continuations thereof, and not as new enactments.

History: En. Sec. 5, Pen. C. 1895; re-en. Statutes 225 3/4.
 Sec. 8097, Rev. C. 1907; re-en. Sec. 10711, 59 C.J. Statutes § 624 et seq.
 R. C. M. 1921. Cal. Pen. C. Sec. 5.

94-103. (10712) Effect of code upon past offenses. No act or omission, commenced after twelve o'clock, noon, of the day on which this code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this code, or by some of the statutes which it specifies as continuing in force and as not affected by its provisions, or by some ordinance, municipal, county, or township regulation, passed or adopted under any such statutes, and in force when this code takes effect. Any act or omission commenced prior to that time may be inquired of, prosecuted, and punished in the same manner as if this code had not been passed.

History: En. Sec. 6, Pen. C. 1895; re-en. Criminal Law 13.
 Sec. 8098, Rev. C. 1907; re-en. Sec. 22 C.J.S. Criminal Law §§ 1, 24.
 10712, R. C. M. 1921. Cal. Pen. C. Sec. 6.

94-104. (10713) Repealed—Chapter 25, laws of 1947.

94-105. (10714) What intent to defraud is sufficient. Whenever, by any of the provisions of this code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever.

History: En. Sec. 8, Pen. C. 1895; re-en. False Pretenses 5; Fraud 68.
 Sec. 8100, Rev. C. 1907; re-en. Sec. 2 C.J.S. Agency § 10; 35 C.J.S. False
 10714, R. C. M. 1921. Cal. Pen. C. Sec. 8. Pretenses §§ 4, 5; 37 C.J.S. Fraud § 154.

94-106. (10715) Civil remedies preserved. The omission to specify or affirm in this code any liability to damages, penalty, forfeiture, or other remedy imposed by law, and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, does not affect any right to recover or enforce the same.

History: En. Sec. 9, Pen. C. 1895; re-en. Action 5.
 Sec. 8101, Rev. C. 1907; re-en. Sec. 1 C.J.S. Actions § 11; 29 C.J.S. Em-
 10715, R. C. M. 1921. Cal. Pen. C. Sec. 9. braecry § 10.

References

State ex rel. Stewart v. District Court,
 77 M 361, 372, 251 P 137.

94-107. (10716) Proceedings to impeach or remove officers and others preserved. The omission to specify or affirm in this code any ground of forfeiture of a public office, or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose, or suspend any public officer or other person holding any trust, appointment, or other special authority conferred by law, does not affect such forfeiture or power, or any proceeding authorized by law to carry into effect such impeachment, removal, deposition, or suspension.

History: En. Sec. 10, Pen. C. 1895; re-en. Officers 7; States 52.
 Sec. 8102, Rev. C. 1907; re-en. Sec. 46 C.J. Officers § 146; 59 C.J., States
 10716, R. C. M. 1921. Cal. Pen. C. Sec. 10. § 209 et seq.

94-108. (10717) Authority of court-martial preserved—courts of justice to punish for contempt. This code does not affect any power conferred by law upon any court-martial, or other military authority or officer, to impose or inflict punishment upon offenders; nor any power conferred by law

upon any public body, tribunal, or officer, to impose or inflict punishment for a contempt.

History: En. Sec. 11, Pen. C. 1895; Contempt 30; Militia 21.
re-en. Sec. 8103, Rev. C. 1907; re-en. Sec. 17 C.J.S. Contempt § 43.
10717, R. C. M. 1921. Cal. Pen. C. Sec. 11.

94-109. (10718) Sections declaring crimes punishable—duty of court.

The several sections of this code which declare certain crimes to be punishable as therein mentioned devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed, except in cases where a jury is authorized to determine and impose the same.

History: En. Sec. 12, Pen. C. 1895; Criminal Law 977 (1).
en. Sec. 8104, Rev. C. 1907; re-en. Sec. 24 C.J.S. Criminal Law §§ 1558, 1611,
10718, R. C. M. 1921. Cal. Pen. C. Sec. 12. 1622.

94-110. (10719) Punishments, how determined. Whenever in this code the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the court or by the jury authorized to pass sentence, within such limits as may be prescribed by this code.

History: En. Sec. 13, Pen. C. 1895; Criminal Law 1208 (3).
en. Sec. 8105, Rev. C. 1907; re-en. Sec. 24 C.J.S. Criminal Law § 1982.
10719, R. C. M. 1921. Cal. Pen. C. Sec. 13.

94-111. (10720) Witness' testimony may be read against him on prosecution for perjury. The various sections of this code, which declare that evidence obtained upon the examination of a person as a witness cannot be received against him in any criminal proceeding, do not forbid such evidence being proved against such person upon any proceedings founded upon a charge of perjury committed in such examination.

History: En. Sec. 14, Pen. C. 1895; Perjury 32 (7).
re-en. Sec. 8106, Rev. C. 1907; re-en. Sec. 48 C.J. Perjury § 157.
10720, R. C. M. 1921. Cal. Pen. C. Sec. 14.

94-112. (10721) Crime and public offense defined. A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, any of the following punishments:

1. Death;
2. Imprisonment;
3. Fine;
4. Removal from office; or,
5. Disqualification to hold and enjoy any office of honor, trust, or profit in this state.

History: En. Sec. 15, Pen. C. 1895; Streit v. Justice Court, 45 M 375, 380, 123
re-en. Sec. 8107, Rev. C. 1907; re-en. Sec. P 405.
10721, R. C. M. 1921. Cal. Pen. C. Sec. 15.

Operation and Effect

A contempt of court, punishable by fine or imprisonment, or both, is a public offense under this section. State ex rel. Flynn v. District Court, 24 M 33, 35, 60 P 493.

The threatened violation of a town ordinance is not a "public offense" within the meaning of this section. State ex rel.

A proceeding for the summary removal of a county attorney, for misconduct, even though instituted by a private person, is a public proceeding, and, though it is summary in its nature, is to be classed as a prosecution for crime. State ex rel. McGrade v. District Court, 52 M 371, 373, 157 P 1157.

Held, that an officer (county clerk), charged with willful neglect of duty is not entitled to a trial by jury in a proceeding

for his removal from office. *State v. District Court et al.*, 62 M 600, 602, 205 P 955.

A valid city ordinance, passed by the municipality with the design of the legislature is a "law" as that term is used in this section, defining a public offense as an act committed or omitted in violation of a law, and such ordinance has, within the territorial jurisdiction of the municipality, the same force and is to be treated as a legislative act. *State ex rel. Marquette v. Police Court*, 86 M 297, 309 et seq., 283 P 430.

Id. Held, under the above rule, that an action by a city instituted in its police court by the filing of a complaint charging a physician with practicing his profession within the city without first procuring a license permitting him to do so, in violation of one of its ordinances, and seeking the imposition of a fine, was criminal in

its nature, and that therefore the court acquired jurisdiction over defendant by the issuance and service of a warrant of arrest (*City of Bozeman v. Nelson*, 73 M 147, 237 P 528, intimating that such an action is a civil one, modified to conform to the views expressed above.)

References

Cited or applied as section 8107, Revised Codes, in *State v. Driscoll*, 49 M 558, 560, 144 P 153; *State v. District Court*, 61 M 558, 562, 202 P 756; *State v. Gardner*, 77 M 8, 14, 249 P 574; *State ex rel. Odenwald v. District Court*, 98 M 1, 38 P 2d 269; *Keller v. Safeway Stores, Inc.*, 111 M 28, 31, 108 P 2d 605.

Criminal Law—1.

22 C.J.S. Criminal Law §§ 2, 3.

94-113. (10722) Crimes, how divided. Crimes are divided into:

1. Felonies; and,
2. Misdemeanors.

History: En. Sec. 3, p. 189, Cod. Stat. 1871; re-en. Sec. 3, 3d Div. Rev. Stat. 1879; re-en. Sec. 3, 3d Div. Comp. Stat. 1887; re-en. Sec. 16, Pen. C. 1895; re-en. Sec. 8108, Rev. C. 1907; re-en. Sec. 10722, R. C. M. 1921. Cal. Pen. C. Sec. 16.

References

Cited or applied as section 16, Penal

Code, in *State ex rel. City of Butte v. District Court*, 37 M 202, 206, 95 P 841; *State ex rel. Foot v. District Court et al.*, 72 M 374, 378, 233 P 957.

Criminal Law—27.

22 C.J.S. Criminal Law §§ 6, 7.

94-114. (10723) Felony and misdemeanor defined. A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court or jury, it is a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison.

History: En. Sec. 4, p. 190, Cod. Stat. 1871; re-en. Sec. 4, 3d Div. Rev. Stat. 1879; re-en. Sec. 4, 3d Div. Comp. Stat. 1887; amd. Sec. 17, Pen. C. 1895; re-en. Sec. 8109, Rev. C. 1907; re-en. Sec. 10723, R. C. M. 1921. Cal. Pen. C. Sec. 17.

Operation and Effect

Held, that where an offense which is not divisible into degrees and does not include a lesser offense, is punishable either as a misdemeanor or as a felony in the discretion of the court or jury, it is the possible sentence which determines the grade of the crime; hence it is to be deemed a felony up to the time of judgment, whereupon, if the punishment inflicted be other than imprisonment in the state prison, it is to be considered a misdemeanor for all

purposes, under this section. *State v. Atlas*, 75 M 547, 551 et seq., 244 P 477.

Rule to Determine Under Federal Law

As contradistinguished from the rule prevailing in Montana which classifies crimes after judgment as felonies or misdemeanors by the punishment actually imposed, the test to be applied in determining whether a crime is a felony under the federal law is the punishment which may be inflicted, and not what was actually imposed. *State ex rel. Anderson v. Fousek*, 91 M 448, 454, 8 P 2d 791.

References

Cited or applied as section 4, Third Division Revised Statutes 1879, in *Territory v. Duncan*, 5 M 478, 6 P 353; *State ex rel.*

Odenwald v. District Court, 98 M 1, 38 P 2d 269; State v. McGowan, 113 M 591, 594, 131 P 2d 262; State ex rel. Williams v. Henry, — M —, 174 P 2d 220, 222.

Criminal Law—27.

22 C.J.S. Criminal Law §§ 6, 7.

94-115. (10724) Punishment of felony, when not otherwise prescribed.

Except in cases where a different punishment is prescribed by this code, every offense declared to be a felony is punishable by imprisonment in the state prison not exceeding five years.

History: En. Sec. 18, Pen. C. 1895; re-en. Sec. 8110, Rev. C. 1907; re-en. Sec. 10724, R. C. M. 1921. Cal. Pen. C. Sec. 18.

Operation and Effect

Generally, every felony is punishable either by death or imprisonment in the

state prison, and every misdemeanor by fine or imprisonment in the county jail. State ex rel. City of Butte v. District Court, 37 M 202, 206, 95 P 841.

Criminal Law—1208 (6).

24 C.J.S. Criminal Law § 1985.

94-116. (10725) Punishment of misdemeanor, when not otherwise prescribed. Except in cases where a different punishment is prescribed by this code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or both.

History: En. Sec. 19, Pen. C. 1895; re-en. Sec. 8111, Rev. C. 1907; re-en. Sec. 10725, R. C. M. 1921. Cal. Pen. C. Sec. 19.

Applicable to Acts Made Misdemeanors after Passage

Held, that this section is applicable to acts made misdemeanors after its passage. State v. Williams, 106 M 516, 522, 79 P 2d 314.

References

Cited or applied as section 19, Penal Code, in State v. Woodman, 26 M 348, 354, 67 P 1118; State ex rel. City of Butte v. District Court, 37 M 202, 206, 95 P 841; Burr v. Winnett Times Publishing Co. et al., 80 M 70, 80, 258 P 242; State ex rel. Freebourn v. District Court, 105 M 77, 79, 69 P 2d 748.

Criminal Law—1208 (1).

24 C.J.S. Criminal Law §§ 1980, 1986.

94-117. (10726) To constitute crime there must be unity of act and intent. In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence.

History: En. Sec. 1, p. 176, Bannack Stat.; amd. Sec. 1, p. 269, Cod. Stat. 1871; re-en. Sec. 1, 4th Div. Rev. Stat. 1879; re-en. Sec. 1, 4th Div. Comp. Stat. 1887; amd. Sec. 20, Pen. C. 1895; re-en. Sec. 8112, Rev. C. 1907; re-en. Sec. 10726, R. C. M. 1921. Cal. Pen. C. Sec. 20.

Operation and Effect

On the question of insanity in homicide, the court should instruct in the language of this and the following section, then define insanity as any weakness or defect of the mind rendering it incapable of entertaining in the particular instance the criminal intent, supplementing the definition by the comment that criminal responsibility is to be determined solely by defendant's capacity to conceive and entertain the intent to commit the particular crime. State v. Keerl, 29 M 508, 521, 75 P 362.

In view of this and the following section an insane person in criminal law is one who is mentally unable to form a

criminal intent. State v. Keerl, 29 M 508, 520, 75 P 362.

An instruction embodying the provisions of this and the following section, upon the presence of joint operation of act and intent in order to constitute a crime, should be given in every criminal prosecution, especially when requested by defendant. State v. Allen, 34 M 403, 418, 87 P 177.

An instruction charging the jury that, when an unlawful act is shown to have been deliberately committed for the purpose of injuring another, it is presumed to have been committed with a malicious and guilty intent, and that the law presumes that a person intends the ordinary consequences of any voluntary act committed by him, may mislead the jury, and should not be given in a prosecution for assault in the first degree, the very gist of which offense is the intent with which it was committed. State v. Schaefer, 35 M 217, 221, 88 P 792.

In a statutory offense, as for collecting illegal fees, the intent is conclusively presumed. *State ex rel. Rowe v. District Court*, 44 M 318, 326, 119 P 1103.

References

Cited or applied as section 8112, Revised Codes, in *Valley Mer. Co. v. St. Paul F. &*

M. Ins. Co., 49 M 430, 433, 143 P 559; *State v. Smith*, 57 M 563, 580, 190 P 107; *State v. Narich*, 92 M 17, 23, 9 P 2d 477; *State v. Bast*, 116 M 329, 338, 151 P 2d 1009.

Criminal Law—1.

22 C.J.S. Criminal Law §§ 2, 3.

94-118. (10727) Intent, how manifested, and who considered of sound mind. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity.

History: En. Secs. 2, 3, p. 176, *Bannack Stat.*; amd. Secs. 2, 3, p. 269, *Cod. Stat.* 1871; re-en. Secs. 2, 3, 4th Div. *Rev. Stat.* 1879; re-en. Secs. 2, 3, 4th Div. *Comp. Stat.* 1887; amd. Sec. 21, *Pen. C.* 1895; re-en. Sec. 8113, *Rev. C.* 1907; re-en. Sec. 10727, *R. C. M.* 1921. *Cal. Pen. C.* Sec. 21.

Operation and Effect

An instruction in a criminal case, in the language of this section was not objectionable, the expression "the offense" having reference to the crime charged in the information, and not being subject to the criticism that it assumed that in fact a crime had been committed. *State v. Gordon*, 35 M 458, 467, 90 P 173.

The presumption that all persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity, attaches not only in a criminal case in which the defense of insanity is interposed, but generally to human conduct in the relations of life, and the giving of an instruction to that effect in a will contest in which the sanity of the testator was called in question was not error. In *re Murphy's Estate*, 43 M 353, 373, 116 P 1004.

The presumption is that one, who claims to have been injured by transactions had with him at a time when he was not mentally competent, was of sound mind at the time and that he comprehended and knew

the nature and consequences of his acts, and the burden of showing incompetency was upon him by a preponderance of the evidence. *Sommerville v. Greenhood*, 65 M 101, 114, 210 P 1048.

Where the evidence showed that defendant, a total stranger, charged with committing lewd and lascivious acts upon a female child of the age of nine years, accosted her on the street and asked her to come to his room and play with him, and on arriving there locked the door and asked her to remove her dress and then placed his hand upon her shoulder in an attempt to remove her dress, it was sufficient to warrant the jury in believing that he had the intent to arouse his sexual desires in a depraved manner. *State v. Koehler*, 112 M 511, 515, 119 P 2d 35.

References

Cited or applied as section 21, *Penal Code*, in *State v. Keel*, 29 M 508, 520, 75 P 362; *State v. Allen*, 34 M 403, 418, 87 P 177; *State v. Schaefer*, 35 M 217, 221, 88 P 792; *State v. Smith*, 57 M 563, 580, 190 P 107; *In re McCue*, 80 M 537, 549, 261 P 341; *State v. Narich*, 92 M 17, 23, 9 P 2d 477; *State v. Simanton*, 100 M 292, 311, 49 P 2d 981; *State v. Bast*, 116 M 329, 338, 151 P 2d 1009.

Criminal Law—20, 46.

22 C.J.S. Criminal Law §§ 29, 55.

94-119. (10728) Drunkenness no excuse for crime—when it may be considered—how insanity must be proven. 1. No act committed by a person while in a state of voluntary intoxication is less criminal by his being in said condition. But, whenever the actual existence of any particular purpose, motive, or intent, is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.

2. When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven by the defendant by a preponderance of the testimony; provided, however, that said defendant may have his sanity or

insanity determined in the manner provided by law, by requesting the district court to determine the same, at any time before the jury is obtained.

History: En. Sec. 22, Pen. C. 1895; re-en. Sec. 8114, Rev. C. 1907; re-en. Sec. 10728, R. C. M. 1921; amd. Sec. 1, Ch. 87, L. 1925. Cal. Pen. C. Sec. 22.

Burden of Proof

Since the enactment of this section in 1925, the burden of proving insanity, pleaded by a defendant charged with crime, is upon him and not the state; hence an instruction that the state was required to prove beyond a reasonable doubt that defendant was sane at the time of the commission of the offense was error. *State v. De Haan*, 88 M 407, 292 P 1109.

Under Chapter 87, Laws of 1925 (this section), defendant charged with homicide has the burden of proving his defense of insanity by a preponderance of the testimony, and an instruction that the state was required to prove beyond a reasonable doubt that he was sane was erroneous. *State v. Vetter*, 76 M 574, 591, 248 P 179.

Instruction in Language of This Section

Where the sole defense of one charged with an attempt to commit rape was intoxication, the trial court held not to have committed error in giving an instruction in the words of subdivision 1 of this section, although, as a general rule, courts do not approve the giving of abstract propositions of law as instructions to juries. *State v. Stevens*, 104 M 189, 201, 65 P 2d 612.

Instructions on Insanity

In the trial of criminal cases in which the defense of insanity is relied upon, trial courts, in instructing juries on that subject, should make the instructions as plain and simple as possible, incorporate therein the appropriate code sections, supplementing the definition of insanity as indicated in the case of *State v. Peel*, 23 M 358, 59 P 169, and avoid numerous instructions which may be confusing and serve no useful purpose. *State v. Narich*, 92 M 17, 24, 9 P 2d 477.

Intoxication

Intoxication is no defense to a criminal charge any further than that it may be shown in mitigation, and that it had reached a stage where the accused was incapable of forming a malicious intent, but where defendant on the day previous to the assault told the prosecuting witness that he was going to get a gun and kill him, relative to a matter occurring a year previous, and on the day of the assault, referring to it again, viciously assaulted such witness, thus showing his capacity to harbor malice, his alleged in-

toxication was no defense. *State v. Laughlin*, 105 M 490, 494, 73 P 2d 718.

Operation and Effect

Evidence that defendant's reason had been clouded by intoxication during the earlier hours of the day on which the homicide was committed, and that he suffered periodical attacks due to a diseased condition of the heart, did not warrant an instruction upon the question of his insanity. *State v. Kumm*, 55 M 436, 448, 178 P 288.

Where the question whether defendant was so far under the influence of intoxicating liquor that he could not entertain the necessary criminal intent to commit robbery in the perpetration of which he committed homicide was fully and fairly presented, with instructions tendered by defendant himself, and there was ample evidence to justify the conclusion of the jury that he was able to entertain such intent as evidenced by their verdict, the question of intoxication is eliminated from consideration on appeal. *State v. Reagin*, 64 M 481, 489, 210 P 86.

Evidence in a prosecution for assault in the second degree, in which the defense was insanity, an expert testifying the defendant was suffering from mental epilepsy, rendering him incapable of knowing or remembering what he was doing during an attack, held sufficient to support the verdict of guilty, it appearing, among other things, that after striking his victim with a gun he warned her not to say anything about it, concealed himself thereafter, and a month later detailed the entire transaction to the medical expert. *State v. De Haan*, 88 M 407, 292 P 1109.

Insanity constitutes any defect, weakness or disease of the mind which renders it incapable of entertaining, in the particular instance, the criminal intent which is an ingredient of all crimes. *State v. Narich*, 92 M 17, 24, 9 P 2d 477.

If a person who is charged with murder in first degree was intoxicated when offense was committed to such an extent as to render him incapable of entertaining the purpose, intent, or malice requisite for first degree murder, the crime is reduced to second degree murder. *State v. Palen*, ___ M ___, 178 P 2d 862, 866.

Opinion of Lay Witness on Insanity

Opinion evidence of lay witnesses who were intimately acquainted with defendant charged with homicide prior to the commission of the offense as to his sanity, and who thus had an opportunity to observe his actions theretofore, held admissible on the issue of his then sanity, such

evidence in many instances being more helpful in solving the question than opinions of experts based upon hypothetical questions. *State v. Simpson*, 109 M 198, 209, 95 P 2d 761.

References

Cited or applied as section 8114, Revised Codes, in *State v. Leakey*, 44 M 354, 370, 120 P 234; *State v. Hoffman*, 94 M 573, 586, 23 P 2d 972.

Criminal Law § 53, 355, 570 (2).

22 C.J.S. Criminal Law §§ 66, 621; 23 C.J.S. Criminal Law § 924.

14 Am. Jur. 788, Criminal Law, §§ 32 et seq.; 15 Am. Jur. 27, Criminal Law, §§ 338 et seq.

Test of present insanity preventing trial or punishment. 3 ALR 94.

Remedy of one convicted while insane. 10 ALR 213.

Voluntary intoxication as defense to homicide. 12 ALR 861 and 79 ALR 897.

Constitutionality of statutes relating to determination of plea of insanity in criminal case. 67 ALR 1451.

Constitutionality of statute which provides for commitment of accused acquitted on ground of insanity to hospital for insane without examination of present mental condition. 145 ALR 892.

Test or criterion of mental condition within contemplation of statute providing for commitment of persons because of mental condition. 158 ALR 1220.

CHAPTER 2

PERSONS LIABLE TO PUNISHMENTS—PARTIES TO CRIME

- Section 94-201. Who are capable of committing crimes.
 94-202. Who are liable to punishment.
 94-203. Classification of parties to crime.
 94-204. Who are principals.
 94-205. Who are accessories.
 94-206. Punishment of accessories.

94-201. (10729) Who are capable of committing crimes. All persons are capable of committing crimes except those belonging to the following classes:

1. Children under the age of fourteen, and over the age of seven, in the absence of clear proof that, at the time of committing the act charged against them, they knew its wrongfulness. Children under the age of seven are not capable of committing crime.

2. Idiots.

3. Lunatics and insane persons.

4. Persons who committed the act or made the omission charged under an ignorance or mistake of fact which disproves any criminal intent.

5. Persons who committed the act charged without being conscious thereof.

6. Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.

7. Married women (except for felonies) acting under threats, command, or coercion of their husbands.

8. Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to, and did, believe their lives would be endangered if they refused.

History: For earlier acts see Secs. 4-9, pp. 176, 177, *Bannack Stat.*; Secs. 4-11, p. 270, *Cod. Stat.* 1871; Secs. 4-11, 4th Div. Rev. Stat. 1879; Secs. 4-11, 4th Div. Comp. Stat. 1887.

This section en. Sec. 30, *Pen. C.* 1895;

re-en. Sec. 8116, *Rev. C.* 1907; re-en. Sec. 10729, *R. C. M.* 1921. *Cal. Pen. C.* Sec. 26.

Tribal Indian

Indians, though belonging to a tribe which maintains a tribal organization, oc-

occupying a reservation within a state, are amenable to state laws as to criminal offenses against such laws committed by them off the reservation and within the state, even though crime is against an Indian of the same tribe. *State v. Youpee*, 103 M 86, 93, 61 P 2d 832.

References

Cited or applied as section 30, Penal Code, in *State v. Fisher*, 23 M 540, 557,

59 P 919; *State v. Schlaps*, 78 M 560, 578, 254 P 858; *State v. Narich*, 92 M 17, 23, 9 P 2d 477; *State v. Bast*, 116 M 329, 339, 151 P 2d 1009.

Criminal Law—20, 31, 33, 38, 48; Husband and Wife—108; Infants—66.

22 C.J.S. Criminal Law §§ 29, 38, 40, 42, 44, 47, 49, 51, 53, 57-59; 41 C.J.S. Husband and Wife § 222; 43 C.J.S. Infants § 95.

94-202. (10730) Who are liable to punishment. The following persons are liable to punishment under the laws of this state:

1. All persons who commit, in whole or in part, any crime within this state.
2. All who commit larceny or robbery out of this state, and bring to, or are found with the property stolen in, this state.
3. All who, being out of this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein.

History: En. Sec. 31, Pen. C. 1895; re-en. Sec. 8117, Rev. C. 1907; re-en. Sec. 10730, R. C. M. 1921. Cal. Pen. C. Sec. 27.

Criminal Law—97 (1), 98.

22 C.J.S. Criminal Law §§ 134, 143, 145, 146, 148.

94-203. (10731) Classification of parties to crime. The parties to crimes are classified as:

1. Principals; and,
2. Accessories.

History: En. Sec. 40, Pen. C. 1895; re-en. Sec. 8118, Rev. C. 1907; re-en. Sec. 10731, R. C. M. 1921. Cal. Pen. C. Sec. 30.

References

Cited or applied as section 40, Penal Code, in *State v. De Wolfe*, 29 M 415, 423, 74 P 1084; *State v. McClain et al.*, 76 M 351, 246 P 956.

Guilt of one aiding or abetting suicide. 13 ALR 1259.

Acquittal of principal or conviction of lower degree of offense as affecting prosecution of aider or abetter. 24 ALR 603.

Accessory before fact in manslaughter. 44 ALR 576.

Criminal responsibility of one who acts as sentinel during violation of intoxicating liquor law. 64 ALR 427.

Incapacity personally to commit the offense as affecting criminal responsibility of one co-operating in offense. 74 ALR 1110.

May accessory to larceny or theft be convicted of offenses of receiving or concealing the stolen property. 136 ALR 1087.

Criminal Law—59 (1), 69, 75.

22 C.J.S. Criminal Law § 79 et seq.

14 Am. Jur. 818, Criminal Law, §§ 71 et seq.

What amounts to participation in homicide on part of one not the actual perpetrator, who was present without preconcert or conspiracy. 12 ALR 275.

94-204. (10732) Who are principals. All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics, or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

History: Earlier acts were Sec. 10, p. 177, Bannack Stat.; Sec. 12, p. 271, Cod. Stat. 1871; Sec. 12, 4th Div. Rev. Stat. 1879; Sec. 12, 4th Div. Comp. Stat. 1887.

This section en. Sec. 41, Pen. C. 1895; re-en. Sec. 8119, Rev. C. 1907; re-en. Sec. 10732, R. C. M. 1921. Cal. Pen. C. Sec. 31.

"Accomplice" Defined

An accomplice is one who is guilty of complicity in the crime charged, either by being present and aiding or abetting in it, or by having advised and encouraged it, though absent from the place at which it is committed. *State v. Spotted Hawk*, 22 M 33; 65, 55 P 1026.

If a witness for the state whose testimony is relied upon by it to convict the defendant on trial for crime could himself have been informed against for the offense, either as principal, strictly speaking, or as accessory before the fact, and as such made a principal by this section, he is an accomplice whose uncorroborated testimony is insufficient to sustain conviction. *State v. Keithley*, 83 M 177, 181, 271 P 452.

To constitute a witness an accomplice he must have been guilty of complicity in the crime charged, either by being present and aiding in and abetting it, or by having advised and encouraged its commission, though absent at the time; he must have knowingly, voluntarily and with common intent with the principal offender united in the commission of the crime, and the test whether or not he is an accomplice is: Would the facts justify his prosecution with the defendant on trial? *State v. McComas et al.*, 85 M 428, 433, 278 P 993.

"Advised" and "Encouraged"

An instruction in a prosecution for grand larceny, that a person who "advised or encouraged" another in the commission of a crime is to be considered a principal, instead of "advised and encouraged," was not prejudicially erroneous, the words "advised" and "encouraged" being synonymous in popular meaning. *State v. Allen*, 34 M 403, 416, 87 P 177.

"Aid and Abet" not "Aid or Abet"

An instruction defining "principals" as all persons who "aid or abet" in the commission of an offense, instead of "aid and abet" as used in this section, is incorrect. *State v. McClain et al.*, 76 M 351, 246 P 956.

The use of the disjunctive "or" in an instruction in a criminal case defining who are principals, saying that one who aids "or" abets another in the commission of an offense is a principal, instead of aids "and" abets, the conjunctive, is error. *State v. Ludwick*, 90 M 41, 300 P 558.

Common Law Distinction Between Principal and Accessory Abolished

The distinction recognized by the common law between principals and accessories before the fact is abolished in this state. *State v. Dotson*, 26 M 305, 308, 67 P 938.

Criminal Intent in one Aiding and Abetting

Whether one charged as a principal in receiving stolen property, though he only aided and abetted another in actually receiving it, knew that it was stolen and entertained the criminal intent required by this section, may be established by circumstantial evidence. *State v. Huffman*, 89 M 194, 200, 296 P 789.

Evidence Insufficient to Hold as Principal

In a prosecution against husband and wife for the unlawful sale of intoxicating liquor, evidence showing that while the wife was present at their home where the sale was made by the husband, all she did was to refer the buyer to him upon request for the liquor, remaining otherwise passive, held insufficient to justify her conviction on the theory that by her presence and acquiescence in what was done by the husband she was guilty as a principal under this section. *State v. Cornish et al.*, 73 M 205, 209, 235 P 702.

Instructions on This Section Proper

In a prosecution for arson, where there is some testimony that defendant procured another to set the fire, the giving of instructions, embodying the provisions of this section and section 94-6423, is proper; as is also the refusing of others, directing the jury to find for the defendant, unless they are satisfied beyond a reasonable doubt that he was present personally and set the fire himself. *State v. Chevigny*, 48 M 382, 385, 138 P 257.

Instructions substantially in the words of this section and section 94-6423 defining a principal and telling the jury that the distinction between a principal and an accessory had been abrogated by statute, were not improper as implying that a felony had been committed. *State v. Wiley*, 53 M 383, 387, 164 P 84.

An instruction that all persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, are principals, correctly stated the law. *State v. Peters et al.*, 72 M 12, 19, 231 P 392.

Where the evidence in a cattle stealing case tended to show that defendant charged jointly with others had entered

into a conspiracy to carry on the larceny of livestock, the giving of instructions relative to who are principals in the commission of a felony and that where a conspiracy has been proven the fact that defendant was not present at the actual taking of the animals was not available to defendant as a defense was proper as applicable to the facts. *State v. Quinlan*, 84 M 364, 371, 275 P 750.

Where the state in a prosecution for grand larceny proceeded on the theory that defendant was present and directly committed the crime of horse stealing, and not on the theory that he was not present but aided and abetted another, an instruction in the language of this section, defining principals as those present and directly committing the crime, or, not being present, aiding and abetting another, held not reversible error, though not approved as proper on retrial. *State v. Hamilton*, 87 M 353, 363, 287 P 933.

An instruction that one may be a principal in the commission of a crime though absent from the place where it was committed, held properly given where the evidence in a larceny case showed that while defendant was not actually present at the place from which personal property was stolen by two confederates, she was in her car near by into which it was placed and taken to a hiding place, she driving the car. *State v. McComas*, 89 M 187, 192, 295 P 1011.

Operation in General

Where two defendants, charged jointly with assault in the first degree, showed by their own testimony that they went to the home of the complaining witness for the purpose of ascertaining whether he had made a certain derogatory statement, whereupon one of them struck him for denying having made it, after which he confessed having made it, and thereupon the other assaulted him, each defendant was an accessory to the other and a principal in the carrying out of a common design, and therefore a requested instruction that if each was acting individually and for separate purposes and not under a common design, neither of them could be convicted, was properly refused as not applicable to the facts or warranted by

their own testimony. *State v. Maggert et al.*, 64 M 331, 337, 209 P 989.

One who, after the crime of larceny is completed, aids and abets another in receiving the stolen property with knowledge that it was stolen and with the intent to prevent the owner from again possessing it, is, under this section, a principal and properly prosecuted as such. *State v. Huffman*, 89 M 194, 200, 296 P 789.

Id. In a prosecution for receiving stolen property of the United States government, to-wit, certain calves belonging to Indians, the state proved that the animals were stolen by two Indians who testified that defendant had given them a standing order that he would buy from them all unbranded animals they would bring to him; that they brought the animals in question to his home in the nighttime, when he stated he had no money but would aid them in taking the animals to a third person where they were received and paid for, defendant was under the last above rule, properly charged as a principal.

Although, under the facts stated, defendant, who it appeared, advised and encouraged the theft of a calf, under this section was an accomplice or accessory before the fact and therefore a principal to the actual theft under section 94-6423 abrogating the distinction, and by legal fiction had constructive possession, but since he later obtained physical possession, the state may elect to prosecute him for receiving stolen property and his contention that he cannot receive from himself the thing he has stolen is illogically basing further fiction upon fiction, implying that it is impossible to receive actual physical possession as distinguished from constructive possession. *State v. Webber*, 112 M 284, 301, 116 P 2d 679.

References

Cited or applied as section 41, Penal Code, in *State v. Martin*, 29 M 273, 280, 74 P 725; *State v. De Wolfe*, 29 M 415, 423, 74 P 1034; *State v. Cassill et al.*, 71 M 274, 280, 229 P 716.

14 Am. Jur. 820, Criminal Law, §§ 75 et seq.

94-205. (10733) Who are accessories. All persons who, after full knowledge that a felony has been committed, conceal it from the magistrate, or harbor or protect the person charged with or convicted thereof, are accessories.

History: Earlier acts were Sec. 11, p. 177, Bannack Stat.; Sec. 13, p. 271, Cod. Stat. 1871; Sec. 13, 4th Div. Rev. Stat. 1879; Sec. 13, 4th Div. Comp. Stat. 1887.

This section en. Sec. 42, Pen. C. 1895; re-en. Sec. 8120, Rev. C. 1907; re-en. Sec. 10733, R. C. M. 1921. Cal. Pen. C. Sec. 32.

If Crime Misdemeanor, Vulnerable to Demurrer

Information charging one as an accessory in that he harbored and protected another with full knowledge that such other had committed a crime, held, under this section, that sufficiency thereof depends upon whether the crime constituted a felony; if the offense was no more than a misdemeanor, the pleading is vulnerable to a demurrer. *State v. Williams*, 106 M 516, 522, 79 P 2d 314.

Operation and Effect

Accessories to crime are still recognized as punishable under our law, but the accessories referred to in the statute are accessories after the fact. Accessories before the fact are treated as principals. *State v. De Wolfe*, 29 M 415, 423, 74 P 1084.

94-206. (10734) Punishment of accessories. Except in cases where a different punishment is prescribed, an accessory is punishable by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding two years, or by fine not exceeding five thousand dollars.

History: En. Sec. 43, Pen. C. 1895; re-en. Sec. 8121, Rev. C. 1907; re-en. Sec. 10734, R. C. M. 1921. Cal. Pen. C. Sec. 33.

References

Cited or applied as section 43, Penal

The term "accessory," as defined by this section, refers exclusively to an accessory after the fact. *State v. Slothower*, 56 M 230, 232, 182 P 270.

One who, though in possession of knowledge of the fact that a felony has been committed, does nothing to conceal it or harbor or protect the offender, is not an accessory within the meaning of this section. *State v. McComas et al.*, 85 M 428, 433, 278 P 993.

Criminal Law §75.

22 C.J.S. Criminal Law § 98.

14 Am. Jur. 832, Criminal Law, §§ 95 et seq.

Liability as accessory for failure to provide medical or surgical attention. 10 ALR 1146.

Criminal Law §82.

22 C.J.S. Criminal Law §§ 104, 105.

CHAPTER 3

ABANDONMENT AND NEGLECT OF WIFE AND CHILDREN

- Section 94-301. Abandonment or failure to support wife and children—penalty for.
 94-302. Orders which may be entered by the court.
 94-303. Certain proof made prima facie evidence.
 94-304. Desertion or abandonment of children a felony—suspension of sentence, when.
 94-305. Disposing of child for mendicant business.
 94-306. Cruelty to children.

94-301. (11017) Abandonment or failure to support wife and children—penalty for. Every person who:

1. Having any child under the age of sixteen years, dependent upon him or her for care, education or support, wilfully omits, without lawful excuse, to furnish necessary food, clothing, shelter or medical attention for his or her child or children, or ward or wards; or,

2. Having sufficient ability to provide for his wife's support, or who is able to earn the means for such wife's support, who wilfully abandons and leaves his wife in a destitute condition, or who refuses or neglects to provide such wife with necessary food, clothing, shelter or medical attendance, unless in the judgment of the court or jury he is justified in abandoning her by her misconduct,

shall be guilty of a misdemeanor.

History: En. Sec. 470, Pen. C. 1895; Ch. 77, L. 1917; re-en. Sec. 11017, R. C. M. re-en. Sec. 8345, Rev. C. 1907; amd. Sec. 1, 1921. Cal. Pen. C. Sec. 270.

Husband and Wife—302; Parent and Child—17 (1).

42 C.J.S. Husband and Wife §§ 631, 632, 634, 653, 655; 46 C.J. Parent and Child § 202 et seq.

39 Am. Jur. 749, Parent and Child, § § 102 et seq.

Criminal liability of father for failure

to support child who is living apart from him without his consent. 23 ALR 864.

Criminal responsibility for abandonment or nonsupport of children who are being cared for by charitable institution. 24 ALR 1075.

Abandonment of adopted child. 44 ALR 820.

94-302. (11018) Orders which may be entered by the court. In any case enumerated in the previous section, the court may render one of the following orders:

1. Should a fine be imposed, it may be directed by the court to be paid in whole or in part to the wife, or to the guardian or custodian of the child or children, or to an individual appointed by the court as trustee.

2. Before trial, or after conviction, with the consent of the defendant, the court, in its discretion, having regard to the circumstances and to the financial ability or earning capacity of the defendant, shall have the power to make an order, which shall be subject to change by it from time to time as circumstances may require, directing the defendant to pay a certain sum weekly, during such time as the court may direct, to the wife, or to the guardian, or to the custodian of the minor child or children, or to an individual appointed by the court, and to release the defendant from custody or probation during such time as the court may direct, upon his or her entering into an undertaking, with or without sureties, in such sum as the court may direct; the condition of the undertaking to be such that if the defendant shall make his or her appearance in court whenever ordered to do so, and shall further comply with the terms of the order, and of any subsequent modification thereof, then the undertaking shall be void, otherwise to remain in full force and effect.

3. Where conviction is had, and sentence to imprisonment in the county jail is imposed, the court may direct that the person so convicted shall be compelled to work upon public roads or highways, during the time of such sentence, or such other work as the court may order, and it shall be the duty of the board of county commissioners of the county where such conviction and sentence is had, and where such work is performed by persons under sentence to the county jail, to allow and order the payment out of the current fund, to the wife, or to the guardian, or to the custodian of the child or children, or to an individual appointed by the court as trustee, at the end of each calendar month, for the support of such wife, child or children, ward or wards, the current wages paid for such labor, less the expense incurred by the county for the maintenance and safe-keeping of such convicted person.

History: En. Sec. 2, Ch. 77, L. 1917; re-en. Sec. 11018, R. C. M. 1921.

42 C.J.S. Husband and Wife §§ 638, 642, 644, 646, 647, 649, 652; 46 C.J. Parent and Child § 202 et seq.

Husband and Wife—315, 316; Parent and Child—17 (7½).

94-303. (11019) Certain proof made prima facie evidence. Proof of the abandonment or nonsupport of a wife, or the omission to furnish necessary food, clothing, shelter, or medical attendance for a child or children, ward or wards, is prima facie evidence that such abandonment or nonsupport or

omission to furnish necessary food, clothing, shelter, or medical attendance is wilful.

History: En. Sec. 3, Ch. 77, L. 1917;
re-en. Sec. 11019, R. C. M. 1921.

Husband and Wife↔313; Parent and
Child↔17 (6).

42 C.J.S. Husband and Wife §§ 640, 657.

94-304. (11020) Desertion or abandonment of children a felony—suspension of sentence, when. Every parent or guardian of any child or children under fifteen years of age who deserts or abandons such child or children without providing necessary and proper shelter, food, care, and clothing for such child or children, shall, upon conviction, be deemed guilty of a felony, and punished by imprisonment in the state prison not exceeding seven years, or by imprisonment in the county jail not exceeding one year. The court may suspend such sentence if the defendant shall furnish a bond in such penal sum, and with such surety or sureties as the court may fix, conditioned that he will furnish his child or children with necessary and proper shelter, food, care, and clothing. In case of failure to comply with the conditions of such bond, the court may order such person to appear before the court and show cause why sentence should not be imposed, whereupon the court may pass sentence or may modify the order and take a new bond and further suspend sentence as may be just and proper.

History: En. Sec. 471, Pen. C. 1895;
amd. Sec. 1, Ch. 6, L. 1905; re-en. Sec. 8346,
Rev. C. 1907; amd. Sec. 1, Ch. 68, L. 1917;
re-en. Sec. 11020, R. C. M. 1921. Cal. Pen.
C. Sec. 270b.

Cross-Reference

Child neglect, punishment, sec. 10-511.

Parent and Child↔17 (1, 7½).

46 C.J. Parent and Child § 202 et seq.

94-305. (11021) Disposing of child for mendicant business. Any person, whether as parent, relative, guardian, employer or otherwise, having in his care, custody, or control any child under the age of sixteen years, who shall sell, apprentice, give away, let out, or otherwise dispose of any such child to any person, under any name, title, or pretense, for the vocation, use, occupation, calling, service, or purpose of singing, playing on musical instruments, rope-walking, dancing, begging, or peddling in any public street or highway, or in any mendicant or wandering business whatever, and any person who shall take, receive, hire, employ, use, or have in custody any child for such purposes, or either of them, is guilty of a misdemeanor.

History: Ap. p. Sec. 13, 5th Div. Comp.
Stat. 1887; en. Sec. 472, Pen. C. 1895;
re-en. Sec. 8347, Rev. C. 1907; re-en. Sec.
11021, R. C. M. 1921. Cal. Pen. C. Sec. 272.

Infants↔20.

43 C.J.S. Infants § 11 et seq.

94-306. (11022) Cruelty to children. Every person who has the legal care or custody of an infant, minor child, or apprentice, and cruelly treats, abuses, or inflicts unnecessary and cruel punishment upon the same, or willfully abandons or neglects such child, is guilty of a misdemeanor.

History: Ap. p. Sec. 11, 5th Div. Comp.
Stat. 1887; amd. Sec. 473, Pen. C. 1895;
en. Sec. 2, Ch. 6, L. 1905; re-en. Sec. 8348,

Rev. C. 1907; re-en. Sec. 11022, R. C. M.
1921.

CHAPTER 4

ABORTION

- Section 94-401. Administering drugs, etc., with intent to produce miscarriage.
 94-402. Submitting to an attempt to produce miscarriage.

94-401. (11023) Administering drugs, etc., with intent to produce miscarriage. Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years.

History: En. Sec. 41, p. 184, Bannack Stat.; amd. Sec. 42, p. 276, Cod. Stat. 1871; re-en. Sec. 42, 4th Div. Rev. Stat. 1879; re-en. Sec. 42, 4th Div. Comp. Stat. 1887; amd. Sec. 480, Pen. C. 1895; re-en. Sec. 8351, Rev. C. 1907; re-en. Sec. 11023, R. C. M. 1921. Cal. Pen. C. Sec. 274.

Cross-Reference

Advertising to procure, penalty, sec. 94-3609.

Abortion—1.

1 C.J.S. Abortion § 3 et seq.

1 Am. Jur. 131, Abortion.

Pregnancy as element of offense of attempt to procure a miscarriage or of homicide predicated on such attempt. 10 ALR 314.

Evidence in prosecution for homicide in attempting to produce abortion, of dying declarations with respect to transactions prior to the homicide. 14 ALR 760.

94-402. (11024) Submitting to an attempt to produce miscarriage. Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than one nor more than five years.

History: En. Sec. 481, Pen. C. 1895; 11024, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8352, Rev. C. 1907; re-en. Sec. 275.

CHAPTER 5

ARSON—MODEL ARSON LAW

- Section 94-501. Purpose of act—short title.
 94-502. Arson—first degree—burning of dwellings.
 94-503. Arson—second degree—burning of buildings, etc., other than dwellings.
 94-504. Arson—third degree—burning of other property.
 94-505. Arson—fourth degree—attempt to burn buildings or property.
 94-506. Burning to defraud insurer.

94-501. Purpose of act—short title. The purpose of this act is to cooperate with local, state and federal governments, in the public welfare, in the prosecution of crimes against property, in the protection of life and property, and as a means of decreasing the criminal activity of arsonists and “firebugs”. This act may be referred to as the “Model Arson Law.”

History: En. Sec. 1, Ch. 271, L. 1947.

Burning as element of offense. 1 ALR 1163.

Arson—2 et seq.

6 C.J.S. Arson § 2 et seq.

See generally, 4 Am. Jur. 85, Arson and Burning to Defraud Insurer.

Criminal responsibility of one co-operating in offense of arson which he is incapable of committing personally. 5 ALR 783.

Ownership of property as affecting criminal liability for burning thereof. 17 ALR 1168.

Intent as essential element of crime of burning property to defraud insurer. 17 ALR 1180.

Ratification or sanction by owner of property or interest therein as affecting criminal responsibility of person burning same. 54 ALR 1236.

Evidence of other offenses in prosecution for arson. 63 ALR 605.

Entrapment to commit arson. 66 ALR 483.

Death resulting from arson as within contemplation of statute making homicide a perpetration of felony murder in first degree. 87 ALR 414.

94-502. Arson—first degree—burning of dwellings. Any person who wilfully, feloniously and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, whether occupied, unoccupied or vacant, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself or of another, shall be guilty of arson in the first degree, and upon conviction thereof, be sentenced to imprisonment in the state prison for not less than two (2) nor more than twenty (20) years.

History: En. Sec. 2, Ch. 271, L. 1947.

Cross-Reference

Burning buildings not subject of arson, penalty, sec. 94-3303.

94-503. Arson—second degree—burning of buildings, etc., other than dwellings. Any person who wilfully, feloniously and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any building or structure of whatsoever class or character, whether the property of himself or of another, not included or described in the preceding section, shall be guilty of arson in the second degree, and upon conviction thereon, be sentenced to imprisonment in the state prison for not less than one (1) nor more than ten (10) years.

History: En. Sec. 3, Ch. 271, L. 1947.

94-504. Arson—third degree—burning of other property. Any person who wilfully, feloniously and maliciously sets fire to or burns, or causes to be burned or who aids, counsels or procures the burning of any personal property of whatsoever class or character, (such property being of the value of twenty-five dollars (\$25.00) and the property of another person), shall be guilty of arson in the third degree and, upon conviction thereof, be sentenced to imprisonment in the state prison for not less than one (1) nor more than three (3) years.

History: En. Sec. 4, Ch. 271, L. 1947.

94-505. Arson—fourth degree—attempt to burn buildings or property. (a) Any person who wilfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in the foregoing sections, or who commits any act preliminary thereto, or in the furtherance thereof, shall be guilty of arson in the fourth degree and, upon conviction thereof, be sentenced to imprisonment in a county jail not exceeding six (6) months, or by a fine not exceeding five hundred dollars (\$500.00), or both.

(b) Definition of an attempt to burn. The placing or distributing of any flammable, explosive or combustible material or substance, or any device in any building or property mentioned in the foregoing sections

in an arrangement or preparation with intent to eventually wilfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of same shall for the purposes of this act constitute an attempt to burn such building or property.

History: En. Sec. 5, Ch. 271, L. 1947.

94-506. Burning to defraud insurer. Any person who wilfully, feloniously and with intent to injure or defraud the insurer sets fire to or burns or attempts so to do or who causes to be burned or who wilfully, maliciously and feloniously aids, counsels or procures the burning of any buildings, structure or personal property, of whatsoever class or character, whether the property of himself or of another, which shall at the time be insured by any person, company, or corporation against loss or damage by fire, shall be guilty of a felony and upon conviction thereof, be sentenced to imprisonment in the state prison for not less than one (1) nor more than five (5) years.

History: En. Sec. 6, Ch. 271, L. 1947.

Cross-Reference

State fire marshal's duty, sec. 82-1213.

CHAPTER 6

ASSAULTS

- Section 94-601. Assault in the first degree defined—penalty.
 94-602. Assault in second degree.
 94-603. Assault in third degree.
 94-604. Assaults with caustic chemicals, etc.
 94-605. Use of force not unlawful.

94-601. (10976) Assault in the first degree defined—penalty. Every person who, with intent to kill a human being, or to commit a felony upon the person or property of the one assaulted or of another:

1. Assaults another with a loaded firearm, or any other deadly weapon, or by any other means or force likely to produce death; or,

2. Administers or causes to be administered to, or taken by another, poison, or any other destructive or noxious thing, so as to endanger the life of such other,

is guilty of assault in the first degree, and is punishable by imprisonment in the state prison not less than five nor more than twenty years.

History: Earlier acts were Secs. 45-47, p. 185, Bannack Stat.; Secs. 55-59, p. 278, Cod. Stat. 1871; Secs. 55-59, 4th Div. Rev. Stat. 1879; Secs. 58-62, 4th Div. Comp. Stat. 1887.

This section en. Sec. 400, Pen. C. 1895; re-en. Sec. 8312, Rev. C. 1907; amd. Sec. 1, Ch. 5, L. 1911; re-en. Sec. 10976, R. C. M. 1921. Cal. Pen. C. Secs. 217, 245.

Cross-Reference

Poisoning food or water, penalty, sec. 94-35-255.

Operation and Effect

In cases of assault of the first degree, where the specific charge in the information is "assault with intent to kill," the instruction should omit all reference to

murder or manslaughter, and advise juries, in lieu thereof, that, to sustain the information, they must find, beyond a reasonable doubt, that the assault was committed with intent to kill. State v. Schaefer, 35 M 217, 222, 88 P 792.

In a prosecution for assault in the first degree, the court may properly submit to the jury the question whether, on the evidence, the defendant, if not guilty as charged, was not guilty of assault in the second degree. State v. Papp, 51 M 405, 409, 153 P 279.

An information charging assault in the first degree with a deadly weapon was sufficient, the words following descriptive of the weapon, "to wit, an instrument about a foot long with a knob on the striking end," being surplusage, the only

effect of which was to confine the prosecution to proof that the assault was committed with the instrument described and not with some other. *State v. Maggert et al.*, 64 M 331, 334, 209 P 989.

References

Cited or applied as Laws of 1911, p. 9, in *In re Gomez*, 52 M 189, 156 P 1078; *State v. Laughlin*, 105 M 490, 496, 73 P 2d 718.

Assault and Battery 60; Homicide 84.

6 C.J.S. Assault and Battery § 59; 40 C.J.S. Homicide §§ 73, 74, 84, 85.

See generally, 4 Am. Jur. 117, Assault and Battery.

Firearm used as a bludgeon as a deadly weapon. 8 ALR 1319.

Cane as deadly weapon. 30 ALR 815.

Kicking as an aggravated assault, or an assault with a deadly weapon. 33 ALR 1186.

Assault with intent to kill in connection with use of automobile for unlawful purpose or in violation of law. 53 ALR 254.

Unloaded firearm as dangerous weapon. 74 ALR 1206.

Automobile as deadly weapon. 129 ALR 390.

94-602. (10977) Assault in second degree. Every person who, under circumstances not amounting to the offense specified in the last section:

1. With intent to injure unlawfully, administers to, or causes to be administered to, or taken by another, poison, or any other destructive or noxious thing, or any drug or medicine, the use of which is dangerous to life or health; or,

2. With intent thereby to enable or assist himself, or any other person, to commit any crime, administers to, or causes to be administered to, or taken, by another, chloroform, ether, laudanum, or any other intoxicating narcotic, or anesthetic agent; or,

3. Wilfully or wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon; or,

4. Wilfully and wrongfully assaults another by the use of a weapon, or other instrument or thing likely to produce grievous bodily harm; or,

5. Assaults another with intent to commit a felony, or to prevent or resist the execution of any lawful process or mandate of any court or officer, or the lawful apprehension or detention of himself, or of any other person,

is guilty of an assault in the second degree, and is punishable by imprisonment in the state prison for not less than one nor more than five years, or by a fine not exceeding two thousand dollars, or both.

History: En. Sec. 401, Pen. C. 1895; re-en. Sec. 8313, Rev. C. 1907; re-en. Sec. 10977, R. C. M. 1921. Cal. Pen. C. Secs. 216, 222, and 245.

Subd. 3.

"Feloniously" Not to Replace "Wilfully" or "Wrongfully"

In charging the crime of assault in the second degree, under this section, which is the wilful or wrongful wounding or inflicting grievous bodily harm upon another, either with or without a weapon, the use of the word "feloniously" does not take the place of "wilfully" or "wrongfully". *State v. Williams*, 106 M 516, 525, 79 P 2d 314.

General Essential Elements

Under this section, to constitute an

assault other than one which involves a technical battery without which the offense is not complete, there must be present both the element of attempt and the element of present ability to inflict the injury. The absence of the latter element does not prevent a conviction for the attempt, for under a charge of assault, the defendant may be convicted either of the assault or of the attempt, because the former includes all the elements of the latter. *State v. Stone*, 40 M 88, 91, 105 P 89.

Instructions on this Section

Where one charged with assault in the second degree was convicted of that crime in the third degree, he was not prejudiced by an instruction which comprised all of the subdivisions of this section, setting

forth the various circumstances under which the crime in the higher degree may be committed. *State v. Farnham*, 35 M 375, 378, 89 P 728.

An instruction in a prosecution for assault in the second degree that if the jury believed that defendant exhibited a pistol to the complaining witness and threatened to kill him, and that the pistol was a weapon likely to produce grievous bodily harm, that defendant was then within shooting distance of the witness, that the latter was actually put in fear of injury and the circumstances were such as ordinarily to induce fear in the mind of a reasonable man, defendant should be found guilty, correctly stated the law. *State v. Karri*, 84 M 130, 137, 276 P 427.

Assault with intent to commit a felony (rape) constituting, under this section, subdivision 5, assault in the second degree, an instruction given in a case in which the information charged assault with intent to commit a felony, to-wit, rape, that the jury could find defendant guilty of either assault in the second degree or not guilty, was correct, as against the contention that the instruction should have been that defendant was either guilty of assault with intent to commit rape or not guilty. *State v. Collins*, 88 M 514, 528, 294 P 957.

Instruction defining term "grievous bodily harm" as used in subdivision 3 of this section, to the effect that such harm would include any injury calculated to interfere with the health or comfort of the person injured, and that the word "grievous" means atrocious, aggravated, harmful, painful, hard to bear and serious in nature, held proper. *State v. Laughlin*, 105 M 490, 494, 73 P 2d 718.

Where the facts disclosed by the evidence under an information charging first degree assault constituted at least a second degree assault, as found by the jury, or no offense at all, contention that the court erred in failing to give an instruction on third degree assault, held not meritorious, particularly where the record did not disclose any request for such an instruction. *State v. Satterfield*, 114 M 122, 127, 132 P 2d 372.

Sufficiency of Information

It is not necessary to allege, in an information for an assault and battery in the second degree, as defined in subdivi-

sion 3 of this section, that "the assault was committed with the intent to inflict grievous bodily harm," because the statutes do not include the word "intent" in defining the crime. *State v. Broadbent*, 19 M 467, 471, 48 P 775. See also *State v. Bloor*, 20 M 574, 583, 52 P 611; *State ex rel. Webb v. District Court*, 37 M 191, 197, 95 P 593.

An information charging defendant with having wilfully, unlawfully, and feloniously assaulted a person with a piece of iron pipe, with intent to inflict grievous bodily harm, was sufficient to charge the defendant with an assault with intent to commit a felony, and gave the district court jurisdiction to try the cause. *State v. Farnham*, 35 M 375, 377, 89 P 728.

An information charging that defendant "did wilfully, unlawfully, wrongfully, intentionally, and feloniously assault one S., by throwing said S. from a moving street-car, with intent in him, the said defendant, to inflict grievous bodily harm upon said S.," was sufficient to charge assault in the second degree, under subdivision 3 of this section. *State v. Tracey*, 35 M 552, 554, 90 P 791.

Verdict of Guilty of Lesser Degree Than Charged

Where defendant, charged with assault in the first degree (allegedly committed with a loaded rifle with intent to kill) under the previous section, admitted on the stand that, using the rifle as a club, he had struck the complaining witness on the head several times, and the injured person had testified that several shots had been fired by defendant, held, that although the testimony of an officer that he found bullet holes in the cabin was based on his inspection the day before trial while the affray took place three and a half months before it could not have been prejudicial where the jury found defendant guilty of second degree assault without justification. *State v. Satterfield*, 114 M 122, 126, 132 P 2d 372.

References

Cited or applied as section 401, Penal Code, in *State v. Connors*, 27 M 227, 228, 70 P 715; as section 8313, Revised Codes, in *State v. Papp*, 51 M 405, 409, 153 P 279; *State v. Crighton*, 97 M 387, 395, 34 P 2d 511.

94-603. (10978) Assault in third degree. Every person who commits an assault or an assault and battery, not such as is specified in the foregoing sections of this chapter, is guilty of assault in the third degree, and is punishable by imprisonment in the county jail not more than six months, or by a fine not more than five hundred dollars, or both.

History: En. Sec. 402, Pen. C. 1895; re-en. Sec. 8314, Rev. C. 1907; re-en. Sec. 10978, R. C. M. 1921.

Cross-Reference

Cruel treatment of insane persons, penalty, sec. 94-3541.

Instructions

In a prosecution for third degree assault, defendant contending that the prosecuting witness (a woman) was at the time trespassing upon his land though repeatedly warned from going thereon, instructed in the words of subd. 3, section 94-605, stating in effect that the owner of the premises may prevent a trespass by force if the force used be no more than necessary for that purpose, held sufficient against defendant's contention that the court of its own motion should have instructed the jury that it was not necessary for defendant to wait for the commission of an overt act on her part before ejecting her forcibly after previous warning.

94-604. (10979) Assaults with caustic chemicals, etc. Every person who wilfully and maliciously places or throws, or causes to be placed or thrown upon the person of another, any vitriol, corrosive acid, or caustic chemical of any nature, with the intent to injure the flesh or disfigure the body of such person, is punishable by imprisonment in the state prison not less than one nor more than fourteen years.

History: En. Sec. 403, Pen. C. 1895; re-en. Sec. 8315, Rev. C. 1907; re-en. Sec. 10979, R. C. M. 1921. Cal. Pen. C. Sec. 244.

Operation and Effect

Wilfulness, malice, and intent to injure are necessary to constitute an assault, with corrosive acids or caustic chemicals, a felony; and, in the absence of a finding

State v. Kline, 113 M 180, 184, 123 P 2d 304.

Operation and Effect

A verdict finding a defendant guilty of an assault with corrosive acids and caustic chemicals, which fails to find that the assault is committed wilfully or maliciously, or with intent to injure, is a verdict of guilty of assault in the third degree. State v. District Court, 35 M 321, 324, 89 P 63.

Where the evidence introduced showed that defendant was guilty of assault in the second degree or not guilty at all, and there was none warranting an instruction on the law applicable to assault in the third degree as defined in this section, the giving of such an instruction was error. State v. Karri, 84 M 130, 137, 276 P 427.

References

State v. Laughlin, 105 M 490, 496, 73 P 2d 718.

as to these necessary requisites, a verdict finding the defendant guilty of an assault with corrosive acids and caustic chemicals will not support a conviction for a felony. State v. District Court, 35 M 321, 323, 89 P 63.

Mayhem by use of poison or acid. 58 ALR 1328.

94-605. (10980) Use of force not unlawful. To use or attempt or offer to use force or violence upon or towards the person of another is not unlawful in the following cases:

1. When necessarily committed by a public officer in the performance of a legal duty, or by any other person assisting him or acting under his direction.

2. When necessarily committed by any person in arresting one who has committed a felony and delivering him to a public officer competent to receive him in custody.

3. When committed either by the party about to be injured, or by another person in his aid or defense, in preventing or attempting to prevent an offense against his person, or a trespass or other unlawful interference with real or personal property in his possession, if the force or violence used is not more than sufficient to prevent such offense.

4. When committed by a parent, or an authorized agent of any parent, or by a guardian, master, or teacher, in the exercise of a lawful authority

to restrain or correct his child, ward, apprentice, or pupil, and the force or violence used is reasonable in manner and moderate in degree.

5. When committed by a carrier of passengers, or the authorized agent or servants of such carrier, or by any person assisting them at their request in expelling from a carriage, coach, railway car, vessel, or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped at any usual stopping place or near any dwelling-house, and the force or violence used is not more than sufficient to expel the offending passenger with a reasonable regard to his personal safety.

6. When committed by any person when preventing an idiot, lunatic, insane person, or other person of unsound mind, including persons temporarily or partially deprived of their reason, from committing an act dangerous to himself or to another, or in enforcing such restraint as is necessary for the protection of his person or for his restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint and custody of his person.

History: En. Sec. 404, Pen. C. 1895; re-en. Sec. 8316, Rev. C. 1907; re-en. Sec. 10980, R. C. M. 1921.

Subd. 3

Right to Kill Game in Defense of Person or Property

On appeal from a conviction of killing an elk out of season, the defense was predicated upon sections 3, 13 and 29, article III of the constitution; held, under the facts presented, that legal justification may always be interposed as a defense by a person charged with killing a wild animal contrary to law, and that the general law on the right to use force, section 64-210, must be construed in *pari materia* with section 26-307 when the latter is found inoperative, otherwise the latter would be unconstitutional as denying an inalienable right. *State v. Rathbone*, 110 M 225, 237, 100 P 2d 86.

Burden on Plaintiff to Prove Excess, Not on Defendant to Justify the Means

Where plaintiff and her husband were trespassers upon the property of the defendant and at least contributed to provoke an alleged assault for which damages were sought, the burden was upon them to prove that the force used by defendant in repelling it was excessive, and therefore an instruction that the burden rested upon defendant to justify the means employed in trying to evict the plaintiff, was erroneous. *Vaughn v. Mesch*, 107 M 498, 510, 87 P 2d 177.

Excessive Force — Provocation — Exemplary Damages

While it is a sound rule that exemplary damages are not recoverable in an assault case where provocation furnished by the

plaintiff affords a reasonable excuse for the assault, the rule that if defendant uses excessive or unwarranted force in repelling the aggressor, such damages may be awarded is equally well settled. *Vaughn v. Mesch*, 107 M 498, 507, 87 P 2d 177.

Malice—Test for Awarding Exemplary Damages

In an assault case where malice is alleged it is not the quantum of force used but whether the assailant was in a malicious state of mind which is the test in awarding exemplary damages; the use of a dangerous weapon (a hammer) is some evidence of a wanton disregard of human life and generally gives rise to such damages; the question of malice is generally one for the jury. *Vaughn v. Mesch*, 107 M 498, 508, 87 P 2d 177.

Operation and Effect

Evidence held to show that the defendant had been in possession of the premises, as owner thereof, for months, and that, under subdivision 3 of this section, he had the right to defend such possession, provided he used no more force than was necessary for that purpose; and that it was error to refuse an instruction to that effect. *State v. Howell*, 21 M 165, 169, 53 P 314.

Provocative acts, conduct or words, if unaccompanied by any overt act of hostility, are not justification for assault; hence, where, in an action for damages for assault, there was no evidence showing an occasion where defendant, under this section, could lawfully use force, an instruction leaving it to the jury to say whether the assault was without legal justification was erroneous. *Hageman v. Arnold*, 79 M 91, 94, 254 P 1070.

The law of self-defense is applicable in assault cases, at least in a case where defendant is charged with feloniously shooting the complaining witness, the law being that where a person assaulted in such a manner as to induce in him a reasonable belief of danger of losing his life or suffering great bodily harm, he is justified in defending himself though the danger be not real but only apparent; if the circumstances were such that a reasonable man would have acted as defendant did, he will be held blameless. *State v. Daw*, 99 M 232, 238, 43 P 2d 240.

Id. Where the trial court, in a prosecution for assault in the second degree, failed in all of its instructions to advise the jury on the law of self-defense that defendant was entitled to measure the apparent threatening danger by the judgment which would have been exercised by a reasonable man, but because of the state

of the record such error was not reviewable, judgment nevertheless reversed for refusal of an instruction correctly stating the law of self-defense.

Id. Where the evidence in a prosecution for assault warrants the giving of an instruction on the matter of self-defense with relation to the rights of defendant in resisting an attack by rioters or by three or more persons committing a tumultuous trespass, the court should point out to the jury the essential differences between an assault by such a body of men and that committed by an individual.

References

State v. Kline (subd. 3), 113 M 180, 185, 123 P 2d 304.

Assault and Battery—63 et seq.
6 C.J.S. Assault and Battery § 86 et seq.

CHAPTER 7

BIGAMY AND INCEST

- Section 94-701. Bigamy defined.
94-702. Exceptions.
94-703. Punishment of bigamy.
94-704. Marrying a husband or wife of another.
94-705. Incest.

94-701. (11025) Bigamy defined. Every person having a husband or wife living who marries any other person, except in the cases specified in the next section, is guilty of bigamy.

History: Earlier acts were Sec. 126, p. 208, *Bannack Stat.*; re-en. Sec. 140, p. 302, *Cod. Stat.* 1871; re-en. Sec. 140, 4th Div. *Rev. Stat.* 1879; re-en. Sec. 155, 4th Div. *Comp. Stat.* 1887.

This section en. Sec. 490, *Pen. C.* 1895; re-en. Sec. 8353, *Rev. C.* 1907; re-en. Sec. 11025, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 281.

Cross-References

Evidence on trial, sec. 94-7214.
Jurisdiction when apprehended in another county, sec. 94-5609.

Bigamy—1.

10 C.J.S. Bigamy § 1.

See generally, 7 *Am. Jur.* 747, *Bigamy*.

Criminal responsibility of single person who marries one already married. 5 *ALR* 783.

Religious belief as affecting crime of bigamy. 24 *ALR* 1237.

Mistaken belief in existence, validity or effect of divorce or separation as defense to prosecution for bigamy. 57 *ALR* 792.

Place where second or later marriage is celebrated as affecting bigamy. 70 *ALR* 1036.

Evidence in prosecution for bigamy of decree of divorce or annulment. 87 *ALR* 1264.

94-702. (11026) Exceptions. The last section does not extend:

1. To any person by reason of any former marriage, whose husband or wife by such marriage has been absent for five successive years, without being known to such person within that time to be living; nor,
2. To any person by reason of any former marriage which has been pronounced void, annulled or dissolved by the judgment of a competent court.

History: Earlier acts were Sec. 126, p. 208, Bannack Stat.; re-en. Sec. 140, p. 302, Cod. Stat. 1871; re-en. Sec. 140, 4th Div. Rev. Stat. 1879; re-en. Sec. 155, 4th Div. Comp. Stat. 1887.

This section en. Sec. 491, Pen. C. 1895; re-en. Sec. 8354, Rev. C. 1907; re-en. Sec. 11026, R. C. M. 1921. Cal. Pen. C. Sec. 282.

Bigamy⊖2.

94-703. (11027) Punishment of bigamy. Bigamy is punishable by fine not exceeding two thousand dollars, and by imprisonment in the state prison not exceeding three years.

History: En. Sec. 492, Pen. C. 1895; re-en. Sec. 8355, Rev. C. 1907; re-en. Sec. 11027, R. C. M. 1921. Cal. Pen. C. Sec. 283.

10 C.J.S. Bigamy § 7.

7 Am. Jur. 762, Bigamy, §§ 23 et seq.

Mistaken belief in existence, validity or effect of divorce or separation as defense to prosecution for bigamy. 57 ALR 792.

Evidence in prosecution for bigamy of decree of divorce or annulment. 87 ALR 1264.

Bigamy⊖17.

10 C.J.S. Bigamy § 23.

94-704. (11028) Marrying a husband or wife of another. Every person who knowingly and wilfully marries the husband or wife of another, in any case in which such husband or wife would be punishable under the provisions of this chapter, is punishable by fine not less than two thousand dollars, or by imprisonment in the state prison not exceeding three years.

History: Ap. p. Sec. 127, p. 208, Bannack Stat.; re-en. Sec. 141, p. 302, Cod. Stat. 1871; re-en. Sec. 141, 4th Div. Rev. Stat. 1879; re-en. Sec. 156, 4th Div. Comp. Stat. 1887; en. Sec. 493, Pen. C. 1895; re-en.

Sec. 8356, Rev. C. 1907; re-en. Sec. 11028, R. C. M. 1921. Cal. Pen. C. Sec. 284.

Bigamy⊖1.

10 C.J.S. Bigamy §§ 1, 2, 4-6, 8.

94-705. (11029) Incest. Persons within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison not exceeding ten years.

History: En. Sec. 128, p. 209, Bannack Stat.; re-en. Sec. 146, p. 303, Cod. Stat. 1871; re-en. Sec. 146, 4th Div. Rev. Stat. 1879; re-en. Sec. 161, 4th Div. Comp. Stat. 1887; amd. Sec. 494, Pen. C. 1895; re-en. Sec. 8357, Rev. C. 1907; re-en. Sec. 11029, R. C. M. 1921. Cal. Pen. C. Sec. 285.

Operation and Effect

A marriage contracted by persons within the degrees of consanguinity prohibited by statute is incestuous, and such persons may be prosecuted under the provisions of this section for the crime of fornication. *Territory v. Corbett*, 3 M 50.

In a prosecution for fornication, it is not necessary to prove that defendants were not married to other persons. *Territory v. Jaspar*, 7 M 1, 14 P 647.

Incest⊖1, 5.

10 C.J.S. Bigamy §§ 1, 3.

See generally, 27 Am. Jur. 287, Incest.

Aiding and abetting offense of incest by one not related to parties. 5 ALR 784.

Relationship created by adoption as within statute prohibiting marriage between parties in relationships, or statute regarding incest. 151 ALR 1146.

CHAPTER 8

BRIBERY AND CORRUPTION

- Section 94-801. Giving bribes to judges, jurors, referees, etc.
 94-802. Receiving bribes by judicial officers, jurors, etc.
 94-803. Extortion.
 94-804. Improper attempts to influence jurors, referees, etc.
 94-805. Misconduct of jurors, referees, etc.
 94-806. Embracery.
 94-807. Misconduct of officers having charge of jury.

- 94-808. Justice or constable purchasing judgment.
 94-809. Convicted officer to forfeit and be disqualified from holding office.
 94-810. Bribery of school trustees.
 94-811. Offender a competent witness.

94-801. (10853) Giving bribes to judges, jurors, referees, etc. Every person who gives or offers to give a bribe to any judicial officer, juror, referee, arbitrator, umpire, appraiser, or assessor, or to any person who may be authorized by law to hear or determine any question or controversy, with intent to influence his vote, opinion, or decision upon any matter or question which is or may be brought before him for decision, is punishable by imprisonment in the state prison not less than one nor more than ten years.

History: En. Sec. 190, Pen. C. 1895;
 re-en. Sec. 8209, Rev. C. 1907; re-en. Sec.
 10853, R. C. M. 1921. Cal. Pen. C. Sec. 92.

Operation and Effect

The provisions of this section include offers made to members of the jury panel, and do not refer to those members only who have been sworn in a particular case, whose votes it is sought to influence. State ex rel. Webb v. District Court, 37 M 191, 198, 95 P 593.

Bribery⇒1 (1).

11 C.J.S. Bribery §§ 1, 2.

See generally, 8 Am. Jur. 885, Bribery.

Contempt by bribing, or attempting to bribe, jurors. 63 ALR 1274, 1280.

Criminal offense of bribery as affected by lack of legal qualification of person assuming to be an officer. 115 ALR 1263.

Attempt by juror to secure, or acceptance of, bribe as contempt. 125 ALR 1279.

94-802. (10854) Receiving bribes by judicial officers, jurors, etc. Every judicial officer, juror, referee, arbitrator, umpire, appraiser, or assessor, and every person authorized by law to hear or determine any question or controversy, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, judgment, action, decision, or other official proceeding upon any matter or question which is or may be brought before him for decision, shall be influenced thereby, is punishable by imprisonment in the state prison not less than one nor more than ten years.

History: En. Sec. 191, Pen. C. 1895;
 re-en. Sec. 8210, Rev. C. 1907; re-en. Sec.
 10854, R. C. M. 1921. Cal. Pen. C. Sec. 93.

Bribery⇒1 (2).

11 C.J.S. Bribery §§ 1, 3.

See generally, 8 Am. Jur. 885, Bribery.

94-803. (10855) Extortion. Every judicial officer who asks or receives any emolument, gratuity, or reward, or any promise thereof, except such as may be authorized by law, for doing any official act, is guilty of a felony.

History: En. Sec. 192, Pen. C. 1895;
 re-en. Sec. 8211, Rev. C. 1907; re-en. Sec.
 10855, R. C. M. 1921. Cal. Pen. C. Sec. 94.

Extortion⇒1.

35 C.J.S. Extortion § 1.

22 Am. Jur. 235, Extortion and Black-mail, § 5 et seq.

94-804. (10856) Improper attempts to influence jurors, referees, etc. Every person who corruptly attempts to influence a juror, or any person summoned or drawn as a juror, or chosen as an arbitrator or umpire, or appointed a referee, in respect to his verdict in, or decision of, any cause or proceeding, pending or about to be brought before him, either:

1. By means of any communication, oral or written, had with him except in the regular course of proceedings;
2. By means of any book, paper, or instrument exhibited, otherwise than in the regular course of proceedings;
3. By means of any threat, intimidation, persuasion, or entreaty; or

4. By means of any promise, assurance of any pecuniary or other advantage, is punishable by fine not exceeding five thousand dollars, or by imprisonment in the state prison not exceeding five years.

History: En. Sec. 193, Pen. C. 1895; re-en. Sec. 8212, Rev. C. 1907; re-en. Sec. 10856, R. C. M. 1921. Cal. Pen. C. Sec. 95.

which a jury is to be selected. State ex rel. Webb v. District Court, 37 M 191, 198, 95 P 593.

Operation and Effect

One who offers a bribe to a juror, with an intent to influence his decision, is guilty of a felony, whether the juror has been actually sworn in a particular case, or is only a member of the panel from

Embracery ⇨ 1.

29 C.J.S. Embracery, §§ 1, 3.

18 Am. Jur. 615, Embracery, §§ 2, 3.

Coercion by foreman of jury. 97 ALR 1038.

94-805. (10857) Misconduct of jurors, referees, etc. Every juror, or person summoned or drawn as a juror, or chosen arbitrator or umpire, or appointed referee, who either:

1. Makes any promise or agreement to give any verdict or decision for or against any party; or,

2. Wilfully and corruptly permits any communication to be made to him, or receives any book, paper, instrument, or information relating to any cause or matter pending before him, except according to the regular course of proceedings,

is punishable by fine not exceeding five thousand dollars, or by imprisonment in the state prison not exceeding five years.

History: En. Sec. 194, Pen. C. 1895; re-en. Sec. 8213, Rev. C. 1907; re-en. Sec. 10857, R. C. M. 1921. Cal. Pen. C. Sec. 96.

Officers ⇨ 121.

46 C.J. Officers § 346 et seq.

31 Am. Jur. 703, Jury, § 196.

94-806. (10858) Embracery. Every person who influences, or attempts to influence, improperly, a juror in a civil or criminal action or proceeding, or one drawn or summoned to attend as a juror, or one chosen as an arbitrator, or appointed a referee, in respect to his verdict, judgment, report, award, or decision in any cause or matter pending or about to be brought before him in any case, is punishable as provided in section 94-804.

History: En. Sec. 195, Pen. C. 1895; re-en. Sec. 8214, Rev. C. 1907; re-en. Sec. 10858, R. C. M. 1921.

18 Am. Jur. 615, Embracery.

94-807. (10859) Misconduct of officers having charge of jury. Every officer to whose charge a jury is committed by a court or judge, who negligently or wilfully permits them, or any of them, without leave of the court or judge:

1. To receive any communication from any person;
2. To make any communication to any person;
3. To obtain or receive any book or paper or refreshment; or,
4. To leave the jury-room,

is guilty of a misdemeanor.

History: En. Sec. 196, Pen. C. 1895; re-en. Sec. 8215, Rev. C. 1907; re-en. Sec. 10859, R. C. M. 1921.

94-808. (10860) Justice or constable purchasing judgment. Every justice of the peace, or constable of the same township, who purchases or is

interested in the purchase of any judgment, or part thereof, on the docket of, or on any docket in the possession of, such justice, is guilty of a misdemeanor.

History: En. Sec. 113, p. 205, Bannack Stat.; re-en. Sec. 126, p. 298, Cod. Stat. 1871; re-en. Sec. 126, 4th Div. Rev. Stat. 1879; re-en. Sec. 135, 4th Div. Comp. Stat. 1887; amd. Sec. 197, Pen. C. 1895; re-en. Sec. 8216, Rev. C. 1907; re-en. Sec. 10860, R. C. M. 1921. Cal. Pen. C. Sec. 97.

Justices of the Peace 30; Sheriffs and Constables 153.

51 C.J.S. Justices of the Peace § 23; 57 C.J. Sheriffs and Constables § 1112.

94-809. (10861) Convicted officer to forfeit and be disqualified from holding office. Every officer convicted of any crime defined in this chapter, in addition to the punishment prescribed, forfeits his office, and is forever disqualified from holding any office in this state.

History: En. Sec. 198, Pen. C. 1895; re-en. Sec. 8217, Rev. C. 1907; re-en. Sec. 10861, R. C. M. 1921. Cal. Pen. C. Sec. 98.

Officers 31.

46 C.J. Officers § 60.

94-810. (10862) Bribery of school trustees. The offering of any valuable thing to any member of a board of education, school trustee, or other school officer, with the intent thereby to influence his action in regard to the granting of any teacher's certificate, the appointment of any teacher, superintendent, or other officer or employee, the adoption of any textbook, or the making of any contract to which a board of education, school trustees, or other officer is a party, or the acceptance by any member of a board or officer of any valuable thing, with corrupt intent, shall be a felony, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the penitentiary not exceeding one year, or by both such fine and imprisonment; and the person so convicted shall be forever disqualified from holding any office of trust or profit.

History: En. Sec. 199, Pen. C. 1895; re-en. Sec. 8218, Rev. C. 1907; re-en. Sec. 10862, R. C. M. 1921.

Officer's lack of authority as affecting offense of bribery. 122 ALR 951.

Bribery as affected by nonexistence of duty upon part of official to do, or refrain from doing, the act in respect of which it was sought to influence him. 158 ALR 323.

See generally, 8 Am. Jur. 885, Bribery.

94-811. (10863) Offender a competent witness. A person offending against any provision of any section of this code relating to bribery is a competent witness against another person so offending, and may be compelled to attend and testify on any trial, hearing, proceeding, or investigation in the same manner as any other person; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying to the giving of a bribe which has been accepted shall not thereafter be liable to indictment, prosecution, or punishment for that bribery, and may plead or prove the giving of testimony accordingly in bar of such indictment or prosecution.

History: En. Sec. 200, Pen. C. 1895; re-en. Sec. 8219, Rev. C. 1907; re-en. Sec. 10863, R. C. M. 1921.

Code, in In re Wellcome, 23 M 213, 218, 58 P 47.

References

Cited or applied as section 200, Penal

Criminal Law 42; Witnesses 48 (1).
22 C.J.S. Criminal Law §§ 41, 46; 70
C.J. Witnesses § 131.

CHAPTER 9

BURGLARY AND HOUSEBREAKING—POSSESSION OF BURGLARIOUS INSTRUMENTS AND DEADLY WEAPONS

- Section 94-901. Burglary defined.
 94-902. Degrees of burglary.
 94-903. Penalty.
 94-904. Word "enter" defined.
 94-905. Nighttime defined.
 94-906. Burglary with explosives.
 94-907. Penalty.
 94-908. Possession of burglarious instruments.
 94-909. Carrying deadly weapon with intent to assault—penalty.

94-901. (11346) Burglary defined. Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, out-house, or other building, tent, vessel, railroad car, with intent to commit grand or petit larceny or any felony, is guilty of burglary.

History: Ap. p. Sec. 58, p. 188, *Bannack Stat.*; re-en. Sec. 69, p. 281, *Cod. Stat.* 1871; re-en. Sec. 69, 4th Div. *Rev. Stat.* 1879; amd. Sec. 1, p. 50, *L.* 1885; re-en. Sec. 73, 4th Div. *Comp. Stat.* 1887; amd. Sec. 820, *Pen. C.* 1895; re-en. Sec. 8620, *Rev. C.* 1907; re-en. Sec. 11346, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 459.

Cross-References

Jurisdiction when property brought into another county, sec. 94-5610.

Verdict to show value of property, sec. 94-7410.

Act of Entry Must be a Trespass

Under this section the act of entry, to constitute a crime, must be itself a trespass, and the information should therefore negative the idea that the defendant, at the time of entry, had the right to enter. *State v. Mish*, 36 M 168, 170, 92 P 459. See *State v. Rodgers*, 40 M 248, 251, 106 P 3.

In order to constitute a burglarious entry within the meaning of this section, defining burglary, the nature of the entry must be itself a trespass, i.e., the invasion of the possession of another. *State v. Starkweather*, 89 M 381, 385, 297 P 497.

Id. Defendant, convicted of burglary in the nighttime, was operating a barber-shop, located in the front part of a pool-hall, under a lease; he had a key to the back door leading into the pool-hall, in which cigars were kept for sale, through which door he was required to go to gain access to the basement for the purpose, among others, of keeping fire in a heater which provided hot water for the shop. The lessor, suspecting defendant of stealing cigars, wired the back door and discovered him early in the morning climbing through the transom above the door into the pool-hall and abstracting two cigars from the case. Held, that under the lease defendant had the unrestricted

right to enter the pool-hall at any time during the day or night, and the prosecuting witness had no right to wire shut the door; that defendant in gaining entrance into the pool-hall as he did, did not invade the possession of the owner, and hence was not guilty of any greater offense than petit larceny.

Corpus Delicti may be Proven by Circumstantial Evidence

Held, that the corpus delicti in all criminal prosecutions (except in cases of homicide, section 94-2510), need not be established by direct and positive proof but may be proven by circumstantial evidence, and that in the instant case (burglary) it was so proven, the fact that there was no evidence to show how the entry was made being immaterial. *State v. Dixon*, 80 M 181, 260 P 138.

Elements of Burglary

The entry of a building with the intent to commit a larceny or some felony is all that by the statute is made essential to the crime of burglary. The gravamen of the charge is the entry with this criminal intent. *State v. Rogers*, 31 M 1, 3, 77 P 293.

In a prosecution for burglary it is not necessary to prove that a larceny was committed, the gravamen of the offense being the entry with intent to commit that or some other crime mentioned in the statute. *State v. Ebel*, 92 M 413, 416, 15 P 2d 233.

Evidence Showing Sufficient Entry

Evidence in a prosecution for burglary committed by entering a barn the opening into which was guarded by a canvas curtain instead of by a door, for the purpose of stealing parts of an automobile, examined and held sufficient to show an entry with intent to commit larceny. *State v. Larson*, 75 M 274, 277, 243 P 566.

"House" or "Building"

A structure which has walls on all sides and is covered by a roof is a "house" or a "building" within the meaning of this section, defining the crime of burglary as the entry therein with intent to commit grand or petit larceny or any felony. *State v. Ebel*, 92 M 413, 416, 15 P 2d 233.

Id. Held, that a sheep-herder's wagon, designed for the purpose of habitation by the herder and the housing of his goods and chattels, being inclosed with four walls and roofed over, meets the above definition of a house or building, the fact that it was not affixed to the soil, but movable from place to place, being immaterial; hence an information charging unlawful entry of such a wagon was sufficient to state a public offense.

Ownership of Building—Pleading

While the ownership of the room or building, charged in an information for burglary to have been entered by defendant, need not be specifically alleged, it is the safer practice to do so, if known to the pleader. *State v. Mish*, 36 M 168, 173, 92 P 459. See *State v. Rodgers*, 40 M 248, 251, 106 P 3.

Possession of Stolen Property—Remoteness of Time

While mere proof of possession of recently stolen property during the commission of a burglary does not raise a presumption of guilt as a matter of law, where it is accompanied by other incriminating circumstances and false or unreasonable explanation, it is sufficient to carry the case to the jury and support conviction; in applying the rule that inference of guilt because of possession decreases in proportion to the lapse of time from the taking to its finding, the further rule must be applied that each case must rest largely upon the surrounding circumstances, the matter resting in the discretion of the court. *State v. Kinghorn*, 109 M 22, 30, 93 P 2d 964.

Sufficiency of the Information

In an information charging burglary, the time during the twenty-four hours of the

day at which the entry into any of the structures enumerated in this section was made need not be alleged, inasmuch as the degree of the offense, whether committed in the day or night-time, is to be determined by the jury under proper instructions. *State v. Copenhaver*, 35 M 342, 344, 89 P 61; *State v. Mish*, 36 M 168, 175, 92 P 459.

Value of Article not Essential to Pleadings

Since it is burglary under this section to enter a house or room with intent to commit petit as well as grand larceny, it is unnecessary to allege the value of the articles sought to be stolen in an information charging an attempt to enter a certain room in a lodging-house with intent to commit larceny. *State v. Mish*, 36 M 168, 174, 92 P 459. See *State v. Rodgers*, 40 M 248, 251, 106 P 3.

In a prosecution for burglary, under a charge that defendant feloniously entered the building in question with intent to commit larceny therein, the state was not required to prove the value of the articles taken therefrom; but where the articles taken consisted of gold watches, fountain pens, etc., introduced at the trial as exhibits, the jury must be held to have been sufficiently advised that they had some value. *State v. Dixon*, 80 M 181, 260 P 138.

References

Cited or applied as section 73, Fourth Division, Compiled Statutes 1887, in *Territory v. Willard*, 8 M 328, 331, 21 P 301.

Burglary

12 C.J.S. Burglary § 1.

See generally, 9 Am. Jur. 237, Burglary.

Opening closed but unlocked door as breaking which will sustain charge of burglary or breaking and entering. 23 ALR 112.

Burglary without breaking. 23 ALR 288.

Vacancy or nonoccupancy of building as affecting its character as a "dwelling" as regards burglary. 85 ALR 428.

94-902. (11347) Degrees of burglary. Every burglary committed in the nighttime is burglary in the first degree, and every burglary committed in the daytime is burglary in the second degree.

History: En. Sec. 1, p. 50, L. 1885; amd. Sec. 74, 4th Div. Comp. Stat. 1887; amd. Sec. 821, Pen. C. 1895; re-en. Sec. 8621, Rev. C. 1907; re-en. Sec. 11347, R. C. M. 1921. Cal. Pen. C. Sec. 460.

Failure to Allege when Crime Committed

An information charging burglary with-

out stating whether the crime was committed in the day or night time held sufficient to sustain conviction of burglary in the first degree. *State v. Summers*, 107 M 34, 35, 79 P 2d 560.

Conviction of burglary in the first degree is warranted under an information charging burglary without specifying

whether it was committed in the daytime or in the nighttime. State ex rel. Williams v. Henry, — M —, 174 P 2d 220, 221.

Id. A judgment is not rendered invalid for failure to state the degree of the crime for which defendant was convicted.

Operation and Effect

Where the defendant was specifically charged with burglary in the nighttime, constituting the first degree of the offense of burglary, the jury could not con-

vict him of the crime in its second degree, as having been committed in the daytime. State v. Copenhagen, 35 M 342, 344, 89 P 61.

References

State v. Ebel, 92 M 413, 416, 15 P 2d 233.

Burglary—10.

12 C.J.S. Burglary § 27.

94-903. (11348) Penalty. Burglary in the first degree is punishable by imprisonment in the state prison for not less than one nor more than fifteen years. Burglary in the second degree is punishable by imprisonment in the state prison for not more than five years.

History: En. Sec. 2, p. 50, L. 1885; re-en. Sec. 75, 4th Div. Comp. Stat. 1887; amd. Sec. 822, Pen. C. 1895; re-en. Sec. 8622, Rev. C. 1907; re-en. Sec. 11348, R. C. M. 1921. Cal. Pen. C. Sec. 461.

der this section and section 94-114, providing that a felony is a crime which is punishable by imprisonment in the state prison. State v. McGowan, 113 M 591, 594, 131 P 2d 262.

Burglary Is a Felony

The crime of burglary is a felony, un-

Burglary—49.

12 C.J.S. Burglary § 68.

94-904. (11349) Word "enter" defined. The word "enter," as used in this chapter, includes the entrance of the offender into such house, room, apartment, tenement, shop, warehouse, stable, outhouse, or other building, tent, vessel, or railroad car, or the insertion therein of any part of his body, or of any instrument or weapon held in his hand, or used or intended to be used, to threaten or intimidate the inmates, or to detach or remove the property.

History: En. Sec. 823, Pen. C. 1895; re-en. Sec. 8623, Rev. C. 1907; re-en. Sec. 11349, R. C. M. 1921.

Operation and Effect

Evidence in a prosecution for burglary committed by entering a barn the opening to which was guarded by a canvas

curtain instead of by a door, for the purpose of stealing parts of an automobile, examined and held sufficient to show an entry with intent to commit larceny. State v. Larson, 75 M 274, 277, 243 P 566.

Burglary—9 (2).

12 C.J.S. Burglary §§ 7, 10.

94-905. (11350) Nighttime defined. The phrase "nighttime," as used in this chapter, means the period between sunset and sunrise.

History: En. Sec. 2, p. 50, L. 1885; re-en. Sec. 74, 4th Div. Comp. Stat. 1887; re-en. Sec. 824, Pen. C. 1895; re-en. Sec. 8624, Rev. C. 1907; re-en. Sec. 11350, R. C. M. 1921. Cal. Pen. C. Sec. 463.

References

State v. Copenhagen, 35 M 342, 343, 89 P 61.

Burglary—8.

12 C.J.S. Burglary §§ 14, 15.

94-906. (11351) Burglary with explosives. Any person who enters a building belonging to another with intent to commit a felony or other crime by the use of nitroglycerine, dynamite, gunpowder, or other high explosives, or who commits a burglary by the use of any such explosives, is guilty of burglary with explosives.

History: En. Sec. 1, Ch. 107, L. 1907; Sec. 8625, Rev. C. 1907; re-en. Sec. 11351, R. C. M. 1921.

94-907. (11352) Penalty. Burglary with explosives is punishable by imprisonment in state prison for not less than fifteen years, and not more than forty years.

History: En. Sec. 2, Ch. 107, L. 1907; Sec. 8626, Rev. C. 1907; re-en. Sec. 11352, R. C. M. 1921.

94-908. (11353) Possession of burglarious instruments. Every person having upon him or in his possession a picklock, crow, key, bit, or other instrument or tool with intent feloniously to break or enter into any building, or who shall knowingly make or alter or shall attempt to make or alter any key or other instrument above named so that the same will fit or open the lock of a building without being requested so to do by some person having the right to open the same, or who shall make, alter, or repair any instrument or thing, knowing or having reason to believe that it is intended to be used in committing a misdemeanor or felony, is guilty of a misdemeanor. Any of the structures mentioned in section 94-901 shall be deemed to be a building within the meaning of this section.

History: Ap. p. Sec. 132, p. 210, Bannack Stat.; re-en. Sec. 149, p. 304, Cod. Stat. 1871; re-en. Sec. 149, 4th Div. Rev. Stat. 1879; re-en. Sec. 174, 4th Div. Comp. Stat. 1887; en. Sec. 830, Pen. C. 1895; re-en. Sec. 8627, Rev. C. 1907; re-en. Sec. 11353, R. C. M. 1921. Cal. Pen. C. Sec. 466.

Burglary⇒12.

12 C.J.S. Burglary § 69.

9 Am. Jur. 281, Burglary, §§ 86 et seq.

Construction and application of statute relating to burglars' tools. 103 ALR 1313.

94-909. (11354) Carrying deadly weapon with intent to assault—penalty. Every person having upon him a deadly weapon with intent to assault another is guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the state prison for a term of not less than one year nor more than five years.

History: En. Sec. 831, Pen. C. 1895; re-en. Sec. 8628, Rev. C. 1907; amd. Sec. 1, Ch. 79, L. 1919; re-en. Sec. 11354, R. C. M. 1921. Cal. Pen. C. Sec. 467.

Operation and Effect

To constitute the crime of carrying a deadly weapon with intent to commit an assault (this section), evidence that an assault was committed is not alone sufficient, but it devolves upon the state to prove beyond a reasonable doubt that defendant armed himself for the specific purpose of committing the assault, and it is not permissible to infer such intent from the bare fact that he bore a weapon at the time of the assault. *State v. Hodge*, 84 M 24, 27, 273 P 1049.

Id. Held, under the above rule, that conviction of defendant charged with the offense therein mentioned, who on observing another driving a herd of cattle toward his range, intercepted them on a public road and, flourishing his revolver over his head, threatened violence if they were driven farther, was unwarranted in the absence of proof that he had armed himself for the specific purpose of committing the assault, and that therefore the trial court properly granted defendant a new trial.

Weapons⇒7.

68 C.J. Weapons § 11 et seq.

CHAPTER 10

COMMON NUISANCES—MAINTENANCE IN CONNECTION WITH SELLING INTOXICATING LIQUORS—OPIUM—PROSTITUTION AND GAMBLING

Section 94-1001. Definition of "person" and "building."

94-1002. Certain buildings declared nuisances.

94-1003. County attorney to abate nuisance—when warrant may issue.

- 94-1004. Verification of complaint—temporary injunction.
- 94-1005. Precedence of actions—dismissal—costs.
- 94-1006. Violation of injunction—punishment.
- 94-1007. Order of abatement—sale of fixtures—closing of buildings—fees—service.
- 94-1008. Proceeds of sale, how applied.
- 94-1009. Owner may give bond—terms of bond—release of property.
- 94-1010. Fine a lien on building.
- 94-1011. Repealing clause.

94-1001. (11123) Definition of "person" and "building." The term "person" as used in this act shall be deemed and held to mean and include individuals, corporations, associations, partnerships, trustees, lessees, agents, and assignees. The term "building" as used in this act shall be deemed and held to mean and include so much of any building or structure of any kind as is or may be entered through the same outside entrance.

History: En. Sec. 1, Ch. 95, L. 1917; re-en. Sec. 11123, R. C. M. 1921.

References

State ex rel. Lamey v. Young, 72 M 408, 416, 234 P 248; State ex rel. Stewart v. District Court, 77 M 361, 373, 251 P 137.

Operation and Effect

While the prior definition of a nuisance is enlarged, no new remedy is created, and the effect of this law is not to supplant the attorney general as a proper party who may invoke the remedy on behalf of the state, but to extend the law by conferring upon a private citizen the right, and upon the county attorney the duty, to suppress the nuisances defined. State ex rel. Ford v. Young, 54 M 401, 404, 170 P 947.

Intoxicating Liquors—143, 167; Nuisance—69.

48 C.J.S. Intoxicating Liquors §§ 226-228, 269, 275, 276, 278, 280-283; 46 C.J. Nuisances § 1 et seq.

94-1002. (11124) Certain buildings declared nuisances. Every building or place used for the purpose of lewdness, assignation, or prostitution, and every building or place wherein or upon which acts of lewdness, assignation, or prostitution are held or occur, and any building wherein gambling is carried on or occurs, contrary to any of the laws of the state of Montana, or wherein any wine rooms are conducted or maintained, contrary to the laws of the state of Montana, or wherein any opium or coca leaves, their salts, derivatives, and preparations thereof are sold or given away or used contrary to the laws of the state of Montana, is a nuisance which shall be enjoined, abated, and prevented as hereinafter provided, whether the same be a public or private nuisance.

History: En. Sec. 2, Ch. 95, L. 1917; amd. Sec. 1, Ch. 76, L. 1921; re-en. Sec. 11124, R. C. M. 1921.

Cross-References

Maintaining gambling apparatus, sec. 94-2409.

Unlawful sales of liquor, sec. 4-239.

"Bank Night" Drawings at Theaters

In an action to enjoin the operation of "bank night" drawings as a lottery under this section, submitted on an agreed statement of facts wherein it was stipulated among other matters that "the money that is used for the purpose of purchasing the defense bond is received from the rental of the store and office properties of the

defendant corporation in the theater buildings, and not from the sale of admission tickets to the theater," held, on the facts presented, that the scheme did not constitute a lottery, and State ex rel. Dusault v. Fox Missoula Theatre Corp., 110 M 441, 101 P 2d 1065 overruled, and second part of section 2, article XIX of constitution is not self executing. State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 57, 70, 132 P 2d 689.

Held, on the authority of State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 132 P 2d 689, that in the absence of a showing that the winner of a prize offered by a theater on "bank night" had paid a valuable consideration for the chance to win, the finding of the court

that the scheme constituted a lottery under section 94-3001 and as such a nuisance under this section, was error. State ex rel. Smith v. Fox Missoula Theatre Corporation, 114 M 102, 103, 132 P 2d 711.

Fraternal Organization; (Abatement and Quo Warranto Proceedings Distinguished)

In an action to abate a gambling nuisance conducted in the club rooms of a fraternal organization wherein exemption was claimed from the operation of the gambling laws under section 94-2403, evidence held sufficient to justify the finding that the entire scheme of operations was a mere subterfuge, and that the gambling was not limited to nor for the amusement of bona fide members, but was operated as a business; the question in abatement being whether a duly organized fraternal organization is permitting practices in its club rooms in violation of the gambling laws as distinguished from a quo warranto attack upon corporate status. State ex rel. Bottomly v. Johnson, 116 M 483, 485, 154 P 2d 262.

Operation and Effect

Since "abatement" of a common nuisance calls for the doing away of the nuisance, and to enjoin or suppress it is tantamount to abatement, the fact that a judgment in such a proceeding merely ordered that hereafter the keeping of liquor and the conducting of gambling games be prohibited therein and the building closed for one year, did not render it insufficient on the alleged ground that it contained no provision ordering the nuisance abated. State ex rel. Lamey v. Young, 72 M 408, 416, 234 P 248.

Reaches All Forms of Gambling

The nuisance statute, this section, under which the action at bar was prosecuted, is intended to reach all forms of gambling, including lotteries which are prohibited by sections 94-3001 et seq. as well as the many forms of gambling enumerated by sections 94-2401 et seq. State ex rel. Leahy v. O'Rourke, 115 M 502, 504, 146 P 2d 168.

References

Cited or applied as section 2, Chapter 95, Laws of 1917, in State ex rel. Ford v. Young, 54 M 401, 402, 170 P 947; State ex rel. Bourquin v. Morris et al., 67 M 40, 42, 214 P 332; State ex rel. Stewart v. District Court, 77 M 361, 373, 251 P 137.

Intoxicating Liquors—260; Nuisance—

61.
48 C.J.S. Intoxicating Liquors §§ 405, 408; 46 C.J. Nuisances § 74 et seq.

17 Am. Jur. 103, Disorderly Houses; 24 Am. Jur. 405, Gaming, § 11.

Disorderly character of house as affected by the number of females who reside therein or resort thereto for immoral purposes. 12 ALR 529.

Right to jury trial in case of seizure of property alleged to be illegally used. 17 ALR 568.

Entrapment to commit crime of procuring women for immoral purposes, with view to prosecution therefor. 18 ALR 186.

Power to declare pool and billiard room and bowling alleys a nuisance per se, and right to enjoin their operation. 20 ALR 1496.

Keeping house of ill fame as "infamous" offense within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 ALR 1011.

Amusement park as a nuisance. 33 ALR 725.

Slot vending machines as gambling devices. 38 ALR 73.

Constitutionality of statute forbidding or regulating dissemination of betting odds or other gambling information. 47 ALR 1135.

Constitutionality of statute enacted to prevent prostitution, and providing that upon the trial of one accused of violating its provisions, the acceptance of money from the earnings of a prostitute shall be prima facie evidence of lack of consideration. 51 ALR 1156.

Constitutionality, construction and application of statute exempting schemes for benefit of public, religious, or charitable purposes from statutes or constitutional provisions against lotteries or gambling. 103 ALR 875.

Construction and application of statute permitting specified form of betting. 117 ALR 828.

Slot machine within prohibitory statute or ordinance as limited to gambling device. 132 ALR 1004.

Failure of police officer to suppress bawdy house as conduct contemplated by statute which makes neglect of duty by public officer or employee a punishable offense. 134 ALR 1250.

What are games of chance, games of skill, and mixed games of chance and skill. 135 ALR 104.

94-1003. (11125) County attorney to abate nuisance—when warrant may issue. Whenever there is a reason to believe that such nuisance is kept, maintained, or exists in any county of the state of Montana, the county attorney must, or any citizen of the county may, maintain an action in equity

in the name of the state of Montana upon the relation of such county attorney or citizen as the case may be to abate and prevent such nuisance and to perpetually enjoin the person or persons conducting or maintaining the same, and the owner, lessee, or agent of the building, or place, in or upon which such nuisance exists, from directly or indirectly maintaining or permitting such nuisance.

No warrant shall be issued against the owner of a private dwelling occupied as such, unless some part of it is used as a store or shop, hotel or boarding-house, or for any other purpose than a private residence, or unless such residence is a place of public resort.

History: En. Sec. 3, Ch. 95, L. 1917; re-en. Sec. 11125, R. C. M. 1921.

Any Citizen of County May Bring Abatement Action

Under this section, the county attorney must, but any citizen may, bring an action in equity to abate a gambling nuisance; hence where the complainant was a citizen the court acquired jurisdiction of the cause; and while there may be ground for criticism of an attorney who acted as complainant, prosecutor and witness, all for a compensation of \$250, where there was no evidence controverting any of the facts brought out by the prosecution, there appears no reason why the supreme

court should question the motive of complainant or the credibility of his testimony. *State ex rel. Leahy v. O'Rourke*, 115 M 502, 508, 146 P 2d 168.

References

Cited or applied as section 3, Chapter 95, Laws of 1917, in *State ex rel. Ford v. Young*, 54 M 401, 402, 170 P 947; *State ex rel. Bourquin v. Morris et al.*, 67 M 40, 42, 214 P 332.

Intoxicating Liquors—264; Nuisance—82.

48 C.J.S. Intoxicating Liquors §§ 405, 408; 46 C.J. Nuisances § 366 et seq.

94-1004. (11126) Verification of complaint—temporary injunction. The complaint in such action must be verified unless filed by the county attorney. Whenever the existence of such nuisance is shown in such action to the satisfaction of the court or judge thereof, either by verified complaint or affidavit, the court or judge shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of such nuisance.

History: En. Sec. 4, Ch. 95, L. 1917; re-en. Sec. 11126, R. C. M. 1921.

Intoxicating Liquors—273, 274; Nuisance—84.

48 C.J.S. Intoxicating Liquors §§ 418, 419; 46 C.J. Nuisances § 366 et seq.

17 Am. Jur. 111, Disorderly Houses, § 10. Right to enjoin threatened or anticipated nuisance. 7 ALR 749.

94-1005. (11127) Precedence of actions—dismissal—costs. The action when brought shall have precedence over all other actions, excepting criminal proceedings, election contests, and hearings on injunction, and in such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance. If the complaint is filed by a citizen, it shall not be dismissed by the plaintiff or for want of prosecution except upon a sworn statement made by the complainant and his attorney, setting forth the reasons why the action should be dismissed, and the dismissal ordered by the court. In case of failure to prosecute any such action with the reasonable diligence, or at the request of the plaintiff, the court, in its discretion, may substitute any such citizen consenting thereto for such plaintiff. If the action is brought by a citizen and the court finds there was no reasonable ground or cause for said action, the costs shall be taxed against such citizen.

History: En. Sec. 5, Ch. 95, L. 1917; re-en. Sec. 11127, R. C. M. 1921.

Intoxicating Liquors 271, 275, 276, 281; Nuisance 84, 88; Trial 13 (1).

References

State v. Peters et al., 72 M 12, 18, 231 P 392.

48 C.J.S. Intoxicating Liquors §§ 416, 420, 421, 428; 46 C.J. Nuisances § 366 et seq.; 64 C.J. Trial § 57 et seq.

94-1006. (11128) Violation of injunction—punishment. Any violation or disobedience of either any injunction or order expressly provided for by this act shall be punished as a contempt of court by a fine of not less than two hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment.

History: En. Sec. 6, Ch. 95, L. 1917; re-en. Sec. 11128, R. C. M. 1921.

Intoxicating Liquors 279; Nuisance 86.

48 C.J.S. Intoxicating Liquors §§ 425, 426; 46 C.J. Nuisances § 431 et seq.

94-1007. (11129) Order of abatement—sale of fixtures—closing of buildings—fees—service. If the existence of the nuisance be established in an action as provided herein, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, musical instruments, gambling paraphernalia, and movable property used in conducting, maintaining, aiding, or abetting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year; unless sooner released, as hereinafter provided. While such order remains in effect as to closing, such building or place shall be and remain in the custody of the court. For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises, and keeping them closed, a reasonable sum shall be allowed by the court; provided, however, that any such fixtures, musical instruments, goods, wares, or merchandise, or other movable property, which has not been the active means of conducting such nuisance, shall, at any time prior to the sale thereof by the sheriff as above provided, be subject to attachment or execution at the instance of a bona fide creditor of the owner thereof, and may be subjected to bankruptcy or insolvency proceedings, the same as if such order of abatement had not been entered. When any such writ of attachment, execution, or other process is placed in the sheriff's hands for service upon any such property, his possession thereof under the order of abatement shall thereupon be deemed to be possession under such writ or process and equivalent to levy, attachment, and seizure thereof.

History: En. Sec. 7, Ch. 95, L. 1917; amd. Sec. 1, Ch. 59, L. 1919; re-en. Sec. 11129, R. C. M. 1921.

Where Evidence Supplies Description Not Specified in Complaint

Where the complaint in an abatement proceeding relative to a gambling nuisance failed to specify particularly the articles constituting the equipment of the place

sought to be confiscated and sold by the sheriff as provided in this section, and the judgment was defective in that respect, but the evidence admitted at the trial without objection sufficiently described the various articles used, it corrected the omission from the complaint sufficiently to enable the court to amend the judgment in that behalf; herein the trial court was ordered to so amend the

judgment. State ex rel. Bottomly v. Johnson, 116 M 483, 489, 154 P 2d 262.

References

State ex rel. Lamey v. Young, 72 M 408, 416, 234 P 248.

Nuisance—85.

46 C.J. Nuisances § 416 et seq.

Constitutionality of statutes conferring on chancery courts power to abate public nuisances. 5 ALR 1474.

Necessity of knowledge by owner of real estate of a nuisance maintained thereon by another to subject him to the operation of a statute providing for the abatement of nuisances, or prescribing a pecuniary penalty therefor. 12 ALR 431.

94-1008. (11130) Proceeds of sale, how applied. The proceeds of the sale of the property, as provided in the preceding section, shall be applied as follows:

1. To the fees and costs of such removal and sale.
2. To the allowance and costs of so closing and keeping closed such building or place.
3. To the payment of the plaintiff's costs in such action.
4. The balance, if any, shall be paid into the common school fund of the school district in which the said property was seized.

If the proceeds of such sale do not fully discharge all such costs, fees, and allowances, the said building and place shall then also be sold under execution issued upon the order of the court or judge and the proceeds of such sale applied in like manner.

History: En. Sec. 8, Ch. 95, L. 1917;
re-en. Sec. 11130, R. C. M. 1921.

References

State ex rel. Bottomly v. Johnson, 116 M 483, 489, 154 P 2d 262.

94-1009. (11131) Owner may give bond — terms of bond — release of property. If the owner of the building or place has not been guilty of any contempt of court in the proceedings, and appears and pays all costs, fees, and allowances which are a lien on the building or place and files a bond in the full value of the property, to be ascertained by the court, with sureties, to be approved by the court or judge, conditioned that he will immediately abate any such nuisance that may exist at such building or place and prevent the same from being established or kept thereat within a period of one year thereafter, the court, or judge thereof, may, if satisfied of his good faith, order the premises closed, under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law.

History: En. Sec. 9, Ch. 95, L. 1917;
re-en. Sec. 11131, R. C. M. 1921.

94-1010. (11132) Fine a lien on building. Whenever the owner of a building or place upon which the act or acts constituting the contempt shall have been committed, or of any interest therein has been guilty of a contempt of court and fined therefor in any proceedings under this act, such fine shall be a lien upon such building and place to the extent of the interest of such person therein enforceable and collectible by execution issued by the order of the court.

History: En. Sec. 10, Ch. 95, L. 1917;
re-en. Sec. 11132, R. C. M. 1921.

94-1011. (11133) Repealing clause. All acts and parts of acts in conflict with the provisions of this act are hereby repealed; provided, that nothing herein shall be construed as repealing any laws of the state of Montana for the suppression of lewdness, assignation, and prostitution, or for the suppression and prevention of gambling, or the suppression and regulation of wine rooms.

History: En. Sec. 11, Ch. 95, L. 1917;
re-en. Sec. 11133, R. C. M. 1921.

Intoxicating Liquors—259; Nuisance—60.

48 C.J.S. Intoxicating Liquors §§ 405, 406; 46 C.J. Nuisances § 17 et seq.

CHAPTER 11

CRIMINAL CONSPIRACY AND ILLEGAL PRACTICES IN RESTRAINT OF TRADE—TRUSTS—DISCRIMINATIONS—POOLING GRAIN WAREHOUSES—DESTROYING FOOD

Section 94-1101.	Criminal conspiracy defined and punishment fixed.
94-1102.	No other conspiracies punishable criminally.
94-1103.	Overt act, when necessary.
94-1104.	Unlawful trusts and monopolies—penalty.
94-1105.	Certain agreements between laborers excepted.
94-1106.	Persons not to be excused from testifying.
94-1107.	Unfair discrimination in purchase price of commodities.
94-1108.	Prosecutions by attorney general.
94-1109.	Penalty for violation of law.
94-1110.	Act is cumulative.
94-1111.	What constitutes unfair competition or discrimination in sale of commodities.
94-1112.	Prosecutions by attorney general.
94-1113.	Penalty for violation of law.
94-1114.	Act is cumulative.
94-1115.	Pooling in purchase, sale or handling of grain by warehousemen.
94-1116.	Penalty for violation of law—notice to grain inspector.
94-1117.	Destruction of food in restraint of trade.
94-1118.	Penalty for violation of act.

94-1101. (10898) Criminal conspiracy defined and punishment fixed.

If two or more persons conspire:

1. To commit any crime;
2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime;
3. Falsely to move or maintain any suit, action, or proceeding;
4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses; or,

5. To commit any act injurious to the public health, to public morals, or for the perversion or obstruction of justice, or due administration of the laws,

they are punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or both.

History: En. Sec. 109, p. 204, Bannack Stat.; re-en. Sec. 123, p. 297, Cod. Stat. 1871; re-en. Sec. 123, 4th Div. Rev. Stat. 1879; re-en. Sec. 132, 4th Div. Comp. Stat. 1887; amd. Sec. 320, Pen. C. 1895; re-en. Sec. 8284, Rev. C. 1907; re-en. Sec. 10898, R. C. M. 1921. Cal. Pen. C. Sec. 182.

Operation and Effect

An indictment for a conspiracy to cheat and defraud a county must allege the means by which the conspiracy was to be accomplished. An allegation that the defendants conspired "to cheat and defraud"

is not sufficient. *Territory v. Carland*, 6 M 14, 15, 9 P 578.

Where, at the time of the making of an agreement to assign certain mining leases, options, and bonds, the assignor had made explorations along the vein, and had concluded that an adjoining mine owner was trespassing on a vein having its apex within the boundaries of the mine leased and assigned, either the assignor or the assignee might have prosecuted such alleged trespass. The fact that the assignment required the assignor to prosecute such action for the benefit of the assignee, who agreed to pay the expenses of the litigation, did not render the contract void as a conspiracy under this section. *Finley v. Heinze*, 28 M 548, 567, 73 P 123.

References

State v. Dennison, 94 M 159, 163, 21 P 2d 63.

Conspiracy ⊕ 28, 30, 34.

15 C.J.S. Conspiracy §§ 48, 49, 62, 65, 70, 71.

94-1102. (10899) No other conspiracies punishable criminally. No conspiracies other than those enumerated in the preceding section are punishable criminally.

History: En. Sec. 322, Pen. C. 1895; re-en. Sec. 8286, Rev. C. 1907; re-en. Sec. 10899, R. C. M. 1921. Cal. Pen. C. Sec. 183.

94-1103. (10900) Overt act, when necessary. No agreement, except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act, besides such agreement, be done to effect the object thereof, by one or more of the parties to the agreement.

History: En. Sec. 323, Pen. C. 1895; re-en. Sec. 8287, Rev. C. 1907; re-en. Sec. 10900, R. C. M. 1921. Cal. Pen. C. Sec. 184.

94-1104. (10901) Unlawful trusts and monopolies—penalty. Every person, corporation, stock company, or association of persons in this state, who, directly or indirectly, combine or form what is known as a trust, or make any contract with any person or persons, corporation, or stock companies, foreign or domestic, through their stockholders, directors, officers, or in any manner whatever, for the purpose of fixing the price or regulating the production of any article of commerce—the phrase “articles of commerce,” as herein employed, shall and does include not only those articles which are generally, popularly, and legally known as articles of commerce, but also gas, water, water power, electric light, and electric power, for whatever purpose used or employed—or of the product of the soil for consumption by the people, or to create or carry out any restriction in trade, to limit productions, or increase or reduce the price of merchandise or commodities, or to prevent competition in merchandise or commodities, or to fix a standard or figure whereby the price of any article of merchandise, commerce, or product, intended for sale, use, or consumption, will be in

See generally, 11 Am. Jur. 541, Conspiracy.

Wife's criminal responsibility for conspiracy with husband. 4 ALR 282.

Conspiracy to commit adultery or other offense which can only be committed by the concerted action of the parties to it. 11 ALR 196.

Substitution or attempted substitution of another for one under sentence as a criminal offense. 28 ALR 1381.

Prosecution of conviction of one party to alleged conspiracy, as affected by disposition of case against other parties. 72 ALR 1180.

Merger of conspiracy in completed offense. 75 ALR 1411.

Woman who connives or consents to own transportation for immoral purposes as co-conspirator. 84 ALR 376.

Taking of usury or excessive interest as subject of criminal conspiracy. 89 ALR 830.

Criminal liability for market manipulation of securities. 115 ALR 274.

Conspiracy ⊕ 23.

15 C.J.S. Conspiracy §§ 34, 35.

Conspiracy ⊕ 27.

15 C.J.S. Conspiracy § 43.

any way controlled, or to create a monopoly in the manufacture, sale, or transportation of any such article, or to enter into an obligation by which they shall bind others or themselves not to manufacture, sell, or transport any such articles below a common standard or figure, or by which they agree to keep such article or transportation at a fixed or graduated figure, or by which they settle the price of such article, so as to preclude unrestricted competition, is punishable by imprisonment in the county jail for a period not less than twenty-four hours or more than one year, or by fine not exceeding twenty-five thousand dollars, or both.

History: En. Sec. 1, Ch. 97, L. 1909; re-en. Sec. 10901, R. C. M. 1921.

Cross-References

Contracts in restraint of trade void, sec. 13-807.

Fair trade act, secs. 85-201 to 85-208.

Monopolies, secs. 51-101 to 51-206.

Monopolies in sale of school books, sec. 75-3506.

Monopoly statutes apply to producers of dairy products, sec. 3-2458.

Motor vehicles, monopolies in financing sales, secs. 51-201 to 51-206.

Operation and Effect

A lease of a service station owned by an oil company under which the lessee bound himself to maintain the price established by the lessor at the various service stations owned by it in the same city, held not void as in violation of this section, prohibiting unlawful trusts and monopolies. *Quinlivan v. Brown Oil Co. et al.*, 96 M 147, 151, 29 P 2d 374.

Id. A contract fixing the price of an article of commerce in a community does not offend against the provisions of this section, if it is reasonable and does not include all of a commodity or trade, or create such restrictions as to materially affect the freedom of commerce.

Plaintiffs in an action seeking the forfeiture of an oil and gas lease, on the ground, among others, that the lessee failed to fulfill the provision of the lease making it its duty to market the gas found, could properly urge that a contract entered into by the lessee with a natural gas company under which the former bound itself not to sell gas to others

within a certain market, was invalid as creating a monopoly contrary to the provisions of section 20, article XV, constitution, and section 13-807 and this section. *Stranahan v. Independent Nat. Gas Co.*, 98 M 597, 609, 41 P 2d 39.

References

Great Northern U. Co. v. Public Ser. Com., 88 M 180, 219, 293 P 294.

Monopolies \Rightarrow 29.

41 C.J. Monopolies §§ 190, 194.

36 Am. Jur. 473, Monopolies, Combinations, and Restraints of Trade.

Legality of combinations or agreements between insurance companies or insurance agents. 21 ALR 543.

"Open competition plan," "gentleman's agreement," and the like, as violation of anti-trust acts. 21 ALR 1109.

Monopoly in dramatics and motion pictures. 26 ALR 369.

The boycott as a weapon in industrial disputes. 27 ALR 651.

Laundry business as within statute relating to monopolies. 31 ALR 533.

Validity of agreement of stockholders not to engage in business in which corporation is engaged. 63 ALR 316.

Collective labor agreement as in restraint of trade or violating anti-trust laws. 95 ALR 25.

Statutes providing for sale of intoxicating liquor by estate or state agencies as creating monopolies. 121 ALR 303.

Judicial decisions involving ASCAP. 136 ALR 1438.

Participation in illegal combination as defense to action under anti-trust act. 160 ALR 381.

94-1105. (10902) Certain agreements between laborers excepted. The provisions of this act do not apply to any arrangements, agreement, or combination between laborers, made with the object of lessening the number of hours of labor or increasing wages.

History: En. Sec. 2, Ch. 97, L. 1909; re-en. Sec. 10902, R. C. M. 1921.

Monopolies \Rightarrow 29.

41 C.J. Monopolies § 164 et seq.

94-1106. (10903) Persons not to be excused from testifying. No person shall be excused from testifying in any prosecution brought pursuant to the provisions of this act, but no person testifying for the prosecution shall be

punished or prosecuted in any manner whatsoever for any act committed by him personally, as to which he is called upon to testify in a prosecution against any person or corporation, stock company, or association.

History: En. Sec. 3, Ch. 97, L. 1909; Criminal Law § 42; Witnesses § 292.
re-en. Sec. 10903, R. C. M. 1921. 22 C.J.S. Criminal Law §§ 41, 46; 70 C.J. Witnesses § 869 et seq.

94-1107. (10904) Unfair discrimination in purchase price of commodities. Any person, firm, company, association, or corporation, either domestic or foreign, doing business in the state of Montana, and engaged in the business of buying, selling, producing, manufacturing, or distributing any commodity or product in general use, that shall, for the purpose of creating a monopoly or destroying the business of a regularly established dealer in such commodity or product, or to prevent the competition of any person, firm, company, association, or corporation who in good faith intends or attempts to become such dealer, shall discriminate between different persons, sections, communities, or portion thereof, or parts of the state of Montana, by purchasing any commodity or product in general use at a higher rate or price in one section, city, or community, or any portion thereof, than such person, firm, company, association, or corporation pays for such commodity or product in another section, city, or community, after making due allowance for the difference in the actual cost of transportation from the point of purchase to the point of manufacture, sale, storage, or distribution, and for the difference in the grade and quality of such commodity, or product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful.

Proof that any person, firm, company, association, or corporation has paid a higher rate or price for any such commodity or product in one section, city, or community, or any portion thereof, than such person, firm, company, association or corporation paid for such commodity or product in another section, city or community, or portion thereof, after making due allowance for the difference in the actual cost of transportation from the point of purchase to the point of manufacture, sale, storage, or distribution, and for the difference in the grade and quality of such commodity, or product, shall be prima facie evidence of the violation of this act; provided, however, that the payment of such higher rate or price in one section, city or community, or any portion thereof, that each person, firm, company, association or corporation pays for such commodity or product in another section, city or community, after making such allowance as above provided, shall not be deemed to be unfair discrimination provided such higher rate or price is paid for the purpose of meeting the rate or price set by a competitor in such section, city or community, but the burden of proof of such fact shall be upon the person, firm, company, association or corporation charged with unfair discrimination.

History: En. Sec. 1, Ch. 8, L. 1913; amd. Sec. 1, Ch. 80, L. 1917; re-en. Sec. 10904, R. C. M. 1921; amd. Sec. 1, Ch. 131, L. 1925.

Operation and Effect

This section seeks to define and provide punishment for unfair discrimination in buying and not in selling, and before a conviction can be sustained, it must be made to appear that the discriminatory rate was paid intentionally for the purpose of stifling competition, and not mere-

Cross-Reference

Unfair practices act, secs. 51-101 to 51-118.

ly that a higher price was paid. State v. Rocky Mountain Elevator Co., 52 M 487, 491, 158 P 818.

Trade-Marks and Trade-Names and Unfair Competition—68 (1).

63 C.J. Trade-Marks, Trade-Names, and Unfair Competition § 100 et seq.

36 Am. Jur. 512, Monopolies, Combinations, and Restraints of Trade, § 28.

Actual competition as necessary element of trademark infringement or unfair competition. 148 ALR 12.

Conflict of laws, with respect to trademark infringement or unfair competition including the area of conflict between federal and state law. 148 ALR 139.

94-1108. (10905) Prosecutions by attorney general. If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination, as defined by this act, he shall forthwith investigate such complaint, and for that purpose he shall subpoena witnesses, administer oaths, take testimony, and require the production of books or other documents, and if, in his opinion, sufficient grounds exist therefor, he shall prosecute an action in the name of the state in the proper court to annul the charter or revoke the permit of such corporation, as the case may be, and to permanently enjoin such corporation from doing business in this state; and if, in such action, the court shall find that such corporation is guilty of unfair discrimination, as defined by this act, such court shall annul the charter or revoke the permit of such corporation, and may permanently enjoin it from transacting business in this state.

History: En. Sec. 2, Ch. 8, L. 1913; amd. Sec. 2, Ch. 80, L. 1917; re-en. Sec. 10905, R. C. M. 1921.

Corporations—599, 613 (1).

19 C.J.S. Corporations §§ 1665, 1699.

94-1109. (10906) Penalty for violation of law. Any person, firm, or corporation violating the provisions of section 94-1107, whether as principal or agent, shall, upon conviction thereof, be fined not less than two hundred dollars nor more than ten thousand dollars for each offense.

History: En. Sec. 3, Ch. 8, L. 1913; amd. Sec. 3, Ch. 80, L. 1917; re-en. Sec. 10906, R. C. M. 1921.

94-1110. (10907) Act is cumulative. Nothing in this act shall be construed as repealing any other act or part of an act, but the remedies herein provided shall be cumulative to all other remedies provided by law.

History: En. Sec. 4, Ch. 80, L. 1917; re-en. Sec. 10907, R. C. M. 1921.

Trade-Marks and Trade-Names and Unfair Competition—80.

63 C.J. Trade-Marks, Trade-Names, and Unfair Competition § 231 et seq.

94-1111. (10908) What constitutes unfair competition or discrimination in sale of commodities. Any person, firm, or corporation, foreign or domestic, doing business in the state of Montana, and engaged in the production, manufacture, or distribution of any commodity in general use, that intentionally, for the purpose of destroying the competition of any regularly established dealer in such commodity, or to prevent the competition of any person, firm, or corporation who in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities, or parts of this state, by selling such commodity at a lower rate or price in one section, city, or community, or any portion thereof, than such person, firm, or corporation, foreign or domestic, charges for such com-

modity in another section, community, or city, after equalizing the distance from the point of production, manufacture, or distribution, and freight rates therefrom, shall be deemed guilty of unfair discrimination.

History: En. Sec. 1, Ch. 7, L. 1913;
re-en. Sec. 10908, R. C. M. 1921.

References

Act referred to as chapter 7, Laws of 1913, in *State v. Rocky Mountain Elevator Co.*, 52 M 487, 492, 158 P 818.

94-1112. (10909) Prosecutions by attorney general. If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination as defined by this act, he shall forthwith investigate such complaint, and for that purpose he shall subpoena witnesses, administer oaths, take testimony, and require the production of books or other documents, and if, in his opinion, sufficient grounds exist therefor, he shall prosecute an action in the name of the state in the proper court to annul the charter or revoke the permit of such corporation, as the case may be, and to permanently enjoin such corporation from doing business in this state, and if, in such action, the court shall find that such corporation is guilty of unfair discrimination as defined by this act, such court shall annul the charter or revoke the permit of such corporation, and may permanently enjoin it from transacting business in this state.

History: En. Sec. 2, Ch. 7, L. 1913;
re-en. Sec. 10909, R. C. M. 1921.

94-1113. (10910) Penalty for violation of law. Any person, firm, or corporation violating the provisions of section 94-1111, whether as principal or agent, shall, upon conviction thereof, be fined not less than two hundred dollars nor more than ten thousand dollars for each offense.

History: En. Sec. 3, Ch. 7, L. 1913;
re-en. Sec. 10910, R. C. M. 1921.

94-1114. (10911) Act is cumulative. Nothing in this act shall be construed as repealing any other act or part of an act, but the remedies herein provided shall be cumulative to all other remedies provided by law.

History: En. Sec. 4, Ch. 7, L. 1913;
re-en. Sec. 10911, R. C. M. 1921.

Trade-Marks and Trade-Names and Unfair Competition § 80.

63 C.J. Trade-Marks, Trade-Names, and Unfair Competition § 231 et seq.

94-1115. (10912) Pooling in purchase, sale or handling of grain by warehousemen. It shall be unlawful for any person, firm, or corporation engaged in the buying, selling, or handling of grain in any public local warehouse in this state, or for the local agent in charge of such warehouse, or any other agent of the person, firm, or corporation operating the same, to enter into any contract, agreement, combination, or understanding with any other person, firm, or corporation, owning or operating any other public local warehouse at any railway station, its agent or agents, whereby the amount of grain to be received or handled by said warehouses at such station or stations shall be equalized or pooled between said warehouses, or whereby the profits or earnings derived from said warehouses shall be divided or pooled or apportioned in any manner, or whereby the price to be paid for any kind of grain, at such station, shall be fixed or in any manner affected;

and each day of the continuance of any such agreement, contract, or understanding shall constitute a separate offense.

History: En. Sec. 1, Ch. 69, L. 1915;
re-en. Sec. 10912, R. C. M. 1921.

94-1116. (10913) Penalty for violation of law—notice to grain inspector.

Any person, firm, or corporation, or any agent of any person, firm, or corporation, who shall violate the provisions of this act, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than fifty dollars or more than three hundred dollars, or by imprisonment in the county jail for not less than thirty days or more than six months, or by both such fine and imprisonment. It shall be the duty of the court before whom a conviction is had to, within ten days after judgment of conviction is rendered, forward a certified copy of said judgment of conviction to the chief grain inspector; and it is hereby made the duty of the chief grain inspector to revoke and annul any license heretofore issued to such person; and in such case no new license shall be granted to the person whose license is revoked, nor to any one either directly or indirectly engaged with him in said business; for a period of one year.

History: En. Sec. 2, Ch. 69, L. 1915;
re-en. Sec. 10913, R. C. M. 1921.

Warehousemen 6, 36.
67 C.J. Warehousemen and Safe Depositories §§ 9, 292.

94-1117. (10914) Destruction of food in restraint of trade. It shall be unlawful for any person, firm, or corporation to destroy, or to withhold from sale for a period of time which makes it necessary to destroy, in restraint of trade, any fish, fowl, animal, vegetable, or other stuff, products, or articles, which are customary food, or which are proper food for human beings, and are in fit sanitary condition to be used as such.

History: En. Sec. 1, Ch. 16, L. 1919;
re-en. Sec. 10914, R. C. M. 1921.

Food 12.
36 C.J.S. Food §§ 21, 22, 26-28.

94-1118. (10915) Penalty for violation of act. Every person or firm or the manager or employee of every corporation violating any of the provisions of this act shall, upon conviction thereof, be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days nor more than six months, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 16, L. 1919;
re-en. Sec. 10915, R. C. M. 1921.

Food 23.
36 C.J.S. Food § 49.

CHAPTER 12

CRUELTY TO ANIMALS

- Section 94-1201. Overdriving animals.
94-1202. Abandonment of disabled animals.
94-1203. Failure to provide proper food and drink to impounded animals.
94-1204. Carrying an animal in a cruel manner.
94-1205. Poisoning animals.
94-1206. Keeping cows in unhealthy places.
94-1207. Promoting fights between animals.
94-1208. Killing, maiming or poisoning livestock.
94-1209. Killing, maiming or poisoning livestock—complaint.

94-1201. (11508) Overdriving animals. Every person who overdrives or overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or another, or deprives any animal of necessary food or drink, or neglects or refuses to furnish it such food or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who wilfully instigates or in any way engages in any act of cruelty to any animal, is guilty of a misdemeanor.

History: Ap. p. Sec. 144, p. 213, Bannack Stat.; re-en. Sec. 172, p. 309, Cod. Stat. 1871; re-en. Sec. 172, 4th Div. Rev. Stat. 1879; amd. Sec. 1, p. 2, L. 1881; re-en. Sec. 215, 4th Div. Comp. Stat. 1887; en. Sec. 1090, Pen. C. 1895; re-en. Sec. 8774,

Rev. C. 1907; re-en. Sec. 11508, R. C. M. 1921. Cal. Pen. C. Sec. 597.

Animals 40.

3 C.J.S. Animals §§ 67, 68, 70-74.

2 Am. Jur. 812, Animals, §§ 162 et seq.

94-1202. (11509) Abandonment of disabled animals. Every person being the owner, or in possession or having charge or custody of a maimed, diseased or infirm animal, who abandons and leaves such animal to die in the street, highway or public place, is guilty of a misdemeanor and such animal may be killed by any sheriff or peace officer in a humane manner, and the owner shall be liable for the necessary care of such animal while living and for the cost of disposing of the carcass.

History: Ap. p. Sec. 1091, Pen. C. 1895; en. Sec. 1, Ch. 35, L. 1905; re-en. Sec. 8775,

Rev. C. 1907; re-en. Sec. 11509, R. C. M. 1921. Cal. Pen. C. Sec. 597f.

94-1203. (11510) Failure to provide proper food and drink to impounded animals. Every person who has impounded or confined any animal and refuses and neglects to supply such animal, during its confinement, with sufficient food, shelter and water, is punishable by imprisonment in the county jail not exceeding thirty days, or by a fine not exceeding one hundred dollars; or both.

History: En. Sec. 1092, Pen. C. 1895; re-en. Sec. 8776, Rev. C. 1907; re-en. Sec.

11510, R. C. M. 1921. Cal. Pen. C. Sec. 597e.

94-1204. (11511) Carrying an animal in a cruel manner. Every person who carries, or causes to be carried, in or upon any car, vessel or vehicle, or otherwise, any animal in a cruel manner, or so as to produce torture, is guilty of a misdemeanor.

History: En. Sec. 1093, Pen. C. 1895; re-en. Sec. 8777, Rev. C. 1907; re-en. Sec.

11511, R. C. M. 1921. Cal. Pen. C. Sec. 597a.

94-1205. (11512) Poisoning animals. Every person who wilfully administers any poison to an animal the property of another or maliciously exposes any poisonous substance with the intent that the same shall be taken or swallowed by any such animal is punishable by imprisonment in the state prison not exceeding three years or in the county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both fine and imprisonment.

History: En. Sec. 143, p. 213, Bannack Stat.; re-en. Sec. 171, p. 309, Cod. Stat. 1871; re-en. Sec. 171, 4th Div. Rev. Stat. 1879; re-en. Sec. 214, 4th Div. Comp. Stat. 1887; amd. Sec. 1094, Pen. C. 1895; re-en.

Sec. 8778, Rev. C. 1907; re-en. Sec. 11512, R. C. M. 1921. Cal. Pen. C. Sec. 596.

Animals 45.

3 C.J.S. Animals §§ 236, 241, 242, 246-254, 337.

94-1206. (11513) Keeping cows in unhealthy places. Every person who keeps a cow or any animal for the production of milk in a crowded or unhealthy place or in a diseased condition, or feeds such cow or animal upon any food that produces impure or unwholesome milk, is punishable by imprisonment in the county jail not exceeding three months or by fine not exceeding two hundred dollars, or both.

History: En. Sec. 1095, Pen. C. 1895; Animals↔181.
re-en. Sec. 8779, Rev. C. 1907; re-en. Sec. 3 C.J.S. Animals § 63.
11513, R. C. M. 1921.

94-1207. (11514) Promoting fights between animals. Every person who instigates, promotes or carries on, or does any act as principal, assistant, referee or umpire, or is a witness of or in any way aids in the furtherance of any fight between cocks or other birds, or dogs, bulls, bears, or other animals premeditated by any person owning or having custody of such birds or animals, is punishable by imprisonment in the county jail not exceeding three months or by fine not exceeding two hundred dollars, or both.

History: En. Sec. 1096, Pen. C. 1895; Theaters and Shows↔9.
re-en. Sec. 8780, Rev. C. 1907; re-en. Sec. 62 C.J. Theaters and Shows § 93 et seq.
11514, R. C. M. 1921. Cal. Pen. C. Sec. 597b.

94-1208. (11515) Killing, maiming or poisoning livestock. Every person who wilfully and maliciously kills or maims any livestock of whatsoever kind, character or description, not his own, by whatsoever means, or who wilfully and maliciously places upon the public ranges or any other lands except his own enclosed tract or tracts, any poison, poisonous substance, or other thing known to be injurious or harmful, or likely to produce the death of any livestock of whatsoever kind, character or description, not his own, is guilty of a felony, and upon conviction shall be punished by not less than one nor more than ten years' imprisonment in the state prison. This act is not intended to prevent or restrict the right of any person to use poison in carcasses or bait on the public range, for the purpose of poisoning coyotes, wolves or other animals destructive to livestock.

History: En. Sec. 1, Ch. 37, L. 1903; nearest the heart from a distance of ten
re-en. Sec. 8781, Rev. C. 1907; re-en. Sec. feet, was sufficient to warrant the in-
11515, R. C. M. 1921. ference that he intended to either kill or
maim them, held sufficient to support the
judgment of conviction, as against the con-
tention that the evidence showed an intent
to kill and not to maim, and that therefore
the judgment should be reversed.

Operation and Effect

To constitute the act of "maiming" an animal a felony within the meaning of this section, permanent injury must have been inflicted. *State v. Benson*, 91 M 21, 24, 5 P 2d 223.

Id. Evidence showing that defendant, charged with attempt to maim horses, had fired a load of shot into each at a point

Animals↔45.
3 C.J.S. Animals §§ 236, 241, 242, 246-254, 337.

94-1209. (11515.1) Killing, maiming or poisoning livestock—complaint. In any prosecution for the violation of the provisions of section 94-1208, prohibiting the malicious killing, maiming or poisoning of livestock, not the property of the defendant, it shall not be necessary for the state to allege in the complaint or information or to prove the ownership of the livestock so alleged to have been killed, maimed or poisoned, but it shall be sufficient to allege in the complaint or information that the owner of such livestock is

unknown and prove that the livestock killed, poisoned or maimed was not the property of the defendant.

History: En. Sec. 1, Ch. 62, L. 1923.

CHAPTER 13

DUELS AND CHALLENGES

- Section 94-1301. Duel defined.
 94-1302. Punishment for fighting a duel, when death ensues.
 94-1303. Punishment for fighting a duel, although death does not ensue.
 94-1304. Posting for not fighting.
 94-1305. Duties of officers to prevent duels.
 94-1306. Leaving the state with intent to evade laws against dueling.
 94-1307. Witness' privilege.

94-1301. (10981) Duel defined. A duel is any combat with deadly weapons, fought between two or more persons, by previous agreement or upon a previous quarrel.

History: En. Sec. 410, Pen. C. 1895; 28 C.J.S. Dueling § 1.
 re-en. Sec. 8317, Rev. C. 1907; re-en. Sec. See generally, 17 Am. Jur. 869, Dueling.
 10981, R. C. M. 1921. Cal. Pen. C. Sec. 225. Challenge to duel as substantive common-law offense. 35 ALR 962.

Dueling⊕1.

94-1302. (10982) Punishment for fighting a duel, when death ensues. Every person guilty of fighting any duel, from which death ensues within a year and a day, is punishable by imprisonment in the state prison not less than one nor more than seven years.

History: Ap. p. Sec. 38, p. 183, Ban- Dueling⊕5.
 nack Stat.; re-en. Sec. 23, p. 274, Cod. 28 C.J.S. Dueling § 2.
 Stat. 1871; re-en. Sec. 23, 4th Div. Rev. See generally, 17 Am. Jur. 869, Dueling.
 Stat. 1879; re-en. Sec. 23, 4th Div. Comp. Challenge to duel as substantive common-law offense. 35 ALR 962.
 Stat. 1887; en. Sec. 411, Pen. C. 1895; re-en. Sec. 8318, Rev. C. 1907; re-en. Sec. 10982, R. C. M. 1921. Cal. Pen. C. Sec. 226.

94-1303. (10983) Punishment for fighting a duel, although death does not ensue. Every person who fights a duel, or accepts or sends a challenge to fight a duel, is punishable by imprisonment in the state prison or in a county jail not exceeding one year.

History: En. Sec. 412, Pen. C. 1895;
 re-en. Sec. 8319, Rev. C. 1907; re-en. Sec. 10983, R. C. M. 1921. Cal. Pen. C. Sec. 227.

94-1304. (10984) Posting for not fighting. Every person who posts or publishes another for not fighting a duel, or for not sending or accepting a challenge to fight a duel, or who uses any reproachful or contemptuous language, verbal, written, or printed, to or concerning another, for not sending or accepting a challenge to fight a duel, or with intent to provoke a duel, is guilty of a misdemeanor.

History: En. Sec. 413, Pen. C. 1895; 10984, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8320, Rev. C. 1907; re-en. Sec. 229.

94-1305. (10985) Duties of officers to prevent duels. Every judge, justice of the peace, sheriff, or other officer bound to preserve the public peace, who has knowledge of the intention on the part of any person to fight a duel,

and who does not exert his official authority to arrest the party and prevent the duel, is punishable by fine not exceeding one thousand dollars.

History: En. Sec. 124, p. 207, Bannack 1887; amd. Sec. 414, Pen. C. 1895; re-en. Stat.; re-en. Sec. 138, p. 300, Cod. Stat. Sec. 8321, Rev. C. 1907; re-en. Sec. 10985, 1871; re-en. Sec. 138, 4th Div. Rev. Stat. R. C. M. 1921. Cal. Pen. C. Sec. 230. 1879; re-en. Sec. 153, 4th Div. Comp. Stat.

94-1306. (10986) Leaving the state with intent to evade laws against dueling. Every person who leaves this state with intent to evade any of the provisions of this chapter, and to commit any act out of this state, such as is prohibited by this chapter, and who does any act, although out of this state, which would be punishable by such provisions if committed within this state, is punishable in the same manner as he would have been in case such act had been committed within this state.

History: En. Sec. 415, Pen. C. 1895; re-en. Sec. 8322, Rev. C. 1907; re-en. Sec. 10986, R. C. M. 1921. Cal. Pen. C. Sec. 231. **Cross-Reference** Leaving state to avoid law on duels, jurisdiction, sec. 94-5604.

Criminal Law 97 (1).
22 C.J.S. Criminal Law § 134.

94-1307. (10987) Witness' privilege. No person shall be excused from testifying or answering any question upon any investigation or trial for a violation of any of the provisions of the six preceding sections, upon the ground that his testimony might tend to convict him of a crime. But no evidence given upon any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding.

History: En. Sec. 416, Pen. C. 1895; re-en. Sec. 8323, Rev. C. 1907; re-en. Sec. 10987, R. C. M. 1921. Cal. Pen. C. Sec. 232. **Criminal Law** 393 (1); **Witnesses** 297. 22 C.J.S. Criminal Law §§ 654-656; 70 C.J. Witnesses § 869 et seq.

CHAPTER 14

ELECTION FRAUDS AND OFFENSES—CORRUPT PRACTICES ACT

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94-1401. (10747) Violation of election laws by certain officers a felony.
 Every person charged with the performance of any duty, under the provisions of any law of this state relating to elections, or the registration of the names of electors, or the canvassing of the returns of election, who wilfully neglects or refuses to perform such duty, or who, in his official capacity, knowingly and fraudulently acts in contravention or violation of any of

the provisions of such laws, is, unless a different punishment for such acts or omissions is prescribed by this code, punishable by fine not exceeding one thousand dollars, or by imprisonment in the state prison not exceeding five years, or both.

History: En. Sec. 60, Pen. C. 1895; 19 M 273, 290, 48 P 1; Cadle v. Town of Baker, 51 M 176, 181, 149 P 960; Wilkinson v. La Combe, 59 M 518, 520, 197 P 836.
re-en. Sec. 8124, Rev. C. 1907; re-en. Sec. 10747, R. C. M. 1921. Cal. Pen. C. Sec. 41.

Cross-Reference

Absent voters' law, violations, sees. 23-1318 to 23-1321.

Elections⇒314.

29 C.J.S. Elections § 327.

References

Cited or applied as section 60, Penal Code, in State ex rel. Brooks v. Fransham,

Criminal responsibility of one cooperating in violation of election law. 74 ALR 1113.

94-1402. (10748) Fraudulent registration a felony. Every person who wilfully causes, procures, or allows himself to be registered in the official register of any election district of any county, knowing himself not to be entitled to such registration, is punishable by a fine not exceeding one thousand dollars, or by imprisonment in the county jail or state prison not exceeding one year, or both. In all cases where, on the trial of the person charged with any offense under the provisions of this section, it appears in evidence that the accused stands registered in such register of any county, without being qualified for such registration, the court must order such registration to be canceled.

History: En. Sec. 61, Pen. C. 1895; re-en. Sec. 8125, Rev. C. 1907; re-en. Sec. 10748, R. C. M. 1921. Cal. Pen. C. Sec. 42.

29 C.J.S. Elections § 326.

18 Am. Jur. 390, Elections, §§ 330 et seq. Constitutionality of corrupt practices acts. 69 ALR 377.

Elections⇒312.

94-1403. (10749) Fraudulent voting. Every person not entitled to vote who fraudulently votes, and every person who votes more than once at any one election, or changes any ballot after the same has been deposited in the ballot-box, or adds, or attempts to add, any ballot to those legally polled at any election, either by fraudulently introducing the same into the ballot-box before or after the ballots therein have been counted; or adds to, or mixes with, or attempts to add to or mix with, the ballots lawfully polled, other ballots, while the same are being counted or canvassed, or at any other time, with intent to change the result of such election; or carries away or destroys, or attempts to carry away or destroy, any poll-lists, check-lists, or ballots, or ballot-box, for the purpose of breaking up or invalidating such election, or wilfully detains, mutilates, or destroys any election returns, or in any manner so interferes with the officers holding such election or conducting such canvass, or with the voters lawfully exercising their rights of voting at such election, as to prevent such election or canvass from being fairly held and lawfully conducted, is guilty of a felony.

History: En. Sec. 62, Pen. C. 1895; re-en. Sec. 8126, Rev. C. 1907; re-en. Sec. 10749, R. C. M. 1921. Cal. Pen. C. Sec. 45.

Elections⇒313, 319.

29 C.J.S. Elections §§ 325, 330.

18 Am. Jur. 392, Elections, § 334.

94-1404. (10750) Attempting to vote without being qualified. Every person not entitled to vote, who fraudulently attempts to vote or register, or

who, being entitled to vote, attempts to vote or register more than once at any election, is guilty of a misdemeanor.

History: En. Sec. 63, Pen. C. 1895; Elections 312, 313.
 re-en. Sec. 8127, Rev. C. 1907; re-en. Sec. 29 C.J.S. Elections §§ 325, 326.
 10750, R. C. M. 1921. Cal. Pen. C. Sec. 46.

94-1405. (10751) Procuring illegal voting. Every person who procures, aids, assists, counsels, or advises another to register or give or offer his vote at any election, knowing that the person is not entitled to vote or register, is guilty of a misdemeanor.

History: En. Sec. 64, Pen. C. 1895; 18 Am. Jur. 392, Elections, § 334.
 re-en. Sec. 8128, Rev. C. 1907; re-en. Sec.
 10751, R. C. M. 1921. Cal. Pen. C. Sec. 47.

94-1406. (10752) Changing ballots or altering returns by election officers. Every officer or clerk of election who aids in changing or destroying any poll-list or check-list, or in placing any ballots in the ballot-box, or taking any therefrom, or adds, or attempts to add, any ballots to those legally polled at such election, either by fraudulently introducing the same into the ballot-box before or after the ballots therein have been counted, or adds to or mixes with, or attempts to add to or mix with, the ballots polled, any other ballots, while the same are being counted or canvassed, or at any other time, with intent to change the result of such election, or allows another to do so, when in his power to prevent it, or carries away or destroys, or knowingly allows another to carry away or destroy, any poll-list, check-list, ballot-box, or ballots lawfully polled, is guilty of a felony.

History: En. Sec. 65, Pen. C. 1895; 29 C.J.S. Elections § 327.
 re-en. Sec. 8129, Rev. C. 1907; re-en. Sec. 18 Am. Jur. 390, Elections, §§ 330 et seq.
 10752, R. C. M. 1921. Cal. Pen. C. Sec. 48. Constitutionality of corrupt practices acts. 69 ALR 377.

Elections 314.

94-1407. (10753) Judges unfolding or marking ballots. Every judge or clerk of an election who, previous to putting the ballot of an elector in the ballot-box, attempts to find out any name on such ballot, or who opens or suffers the folded ballot of any elector which has been handed in, to be opened or examined previous to putting the same into the ballot-box, or who makes or places any mark or device on any folded ballot, with the view to ascertain the name of any person for whom the elector has voted, is punishable by imprisonment in the county jail for a period of six months, or in the state prison not exceeding two years, or by fine, not exceeding five hundred dollars, or by both.

History: En. Sec. 66, Pen. C. 1895; 18 Am. Jur. 393, Elections, § 336.
 re-en. Sec. 8130, Rev. C. 1907; re-en. Sec.
 10753, R. C. M. 1921. Cal. Pen. C. Sec. 49.

94-1408. (10754) Forging or altering returns. Every person who forges or counterfeits returns of an election purporting to have been held at a precinct, town, or ward where no election was in fact held, or wilfully substitutes forged or counterfeit returns of election in the place of the true returns for a precinct, town, or ward where an election was actually held, is punishable by imprisonment in the state prison for a term not less than two nor more than ten years.

History: En. Sec. 67, Pen. C. 1895; Elections 318.
 re-en. Sec. 8131, Rev. C. 1907; re-en. Sec. 29 C.J.S. Elections § 331.
 10754, R. C. M. 1921. Cal. Pen. C. Sec. 50.

94-1409. (10755) Adding to or subtracting from votes given. Every person who wilfully adds to or subtracts from the votes actually cast at an election, in any returns, or who alters such returns, is punishable by imprisonment in the state prison for not less than one nor more than five years.

History: En. Sec. 68, Pen. C. 1895;
 re-en. Sec. 8132, Rev. C. 1907; re-en. Sec.
 10755, R. C. M. 1921. Cal. Pen. C. Sec. 51.

94-1410. (10756) Persons aiding and abetting. Every person who aids or abets in the commission of any of the offenses mentioned in the four preceding sections is punishable by imprisonment in the county jail for a period of six months, or in the state prison not exceeding two years.

History: En. Sec. 69, Pen. C. 1895; Elections 322.
 re-en. Sec. 8133, Rev. C. 1907; re-en. Sec. 29 C.J.S. Elections § 336.
 10756, R. C. M. 1921. Cal. Pen. C. Sec. 52.

94-1411. (10757) Intimidating, corrupting, deceiving or defrauding electors. Every person who, by force, threats, menaces, bribery, or any corrupt means, either directly or indirectly, attempts to influence any elector in giving his vote, or to deter him from giving the same, or attempts by any means whatever to awe, restrain, hinder, or disturb any elector in the free exercise of the right of suffrage, or defrauds any elector at any such election, by deceiving and causing such elector to vote for a different person for any office than he intended or desired to vote for; or who, being judge or clerk of any election, while acting as such, induces, or attempts to induce, any elector, either by menaces or reward, or promise thereof, to vote differently from what such elector intended or desired to vote, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars, or imprisonment not to exceed one year, or both.

History: En. Sec. 70, Pen. C. 1895; Elections 316, 319.
 re-en. Sec. 8134, Rev. C. 1907; re-en. Sec. 29 C.J.S. Elections §§ 330, 332.
 10757, R. C. M. 1921. Cal. Pen. C. Sec. 53. 18 Am. Jur. 390, Elections, §§ 330 et seq.

Cross-Reference

Bribery of electors, secs. 23-918, 94-1423.

94-1412. (10758) Offenses under the election laws. Every person who falsely makes, or fraudulently defaces or destroys, the certificates of nomination of candidates for office, to be filled by the electors at any election, or any part thereof, or files or receives for filing any certificate of nomination, knowing the same, or any part thereof, to be falsely made, or suppresses any certificate of nomination, which has been duly filed, or any part thereof, or forges or falsely makes the official indorsement on any ballot, is guilty of a felony, and upon conviction thereof is punishable by imprisonment in the state prison not less than one nor more than five years.

History: En. Sec. 71, Pen. C. 1895; **Cross-Reference**
 re-en. Sec. 8135, Rev. C. 1907; re-en. Sec. Forgery of nomination papers, sec. 23-935.
 10758, R. C. M. 1921.

Elections 309.

29 C.J.S. Elections §§ 324, 334.

94-1413. (10759) Officers of election not to electioneer, etc. Every officer or clerk of election who deposits in a ballot-box a ballot on which the official stamp, as provided by law, does not appear, or does any electioneering on election day, is guilty of a misdemeanor, and upon conviction is punishable by imprisonment not to exceed six months, or by a fine not less than fifty nor more than five hundred dollars, or both.

History: En. Sec. 72, Pen. C. 1895; re-en. Sec. 8136, Rev. C. 1907; re-en. Sec. 10759, R. C. M. 1921.

Cross-Reference

Electioneering by election officers, sec. 23-1207.

Elections 314.

29 C.J.S. Elections § 327.

94-1414. (10760) Offenses at an election. Every person who, during an election, removes or destroys any of the supplies or other conveniences placed in the booths or compartments for the purpose of enabling a voter to prepare his ballot, or prior to or on the day of election wilfully defaces or destroys any list of candidates posted in accordance with the provisions of law, or during an election tears down or defaces the cards printed for the instruction of voters, or does any electioneering on election day within any polling-place or any building in which an election is being held, or within twenty-five feet thereof, or obstructs the doors or entries thereof, or removes any ballot from the polling-place before the closing of the polls, or shows his ballot to any person after it is marked so as to reveal the contents thereof, or solicits an elector to show his ballot after it is marked, or places a mark on his ballot by which it may afterward be identified, or receives a ballot from any other person than one of the judges of the election having charge of the ballots, or votes or offers to vote any ballot except such as he has received from the judges of election having charge of the ballots, or does not return the ballot before leaving the polling-place, delivered to him by such judges, and which he has not voted, is guilty of a misdemeanor, and is punishable by a fine not exceeding one hundred dollars.

History: En. Sec. 73, Pen. C. 1895; re-en. Sec. 8137, Rev. C. 1907; re-en. Sec. 10760, R. C. M. 1921.

Cross-Reference

Disclosing contents of ballot after marking, sec. 23-1207.

Elections 319.

29 C.J.S. Elections § 330.

94-1415. (10761) Furnishing money or entertainment for, or procuring attendance of, electors. Every person who, with the intention to promote the election of himself or any other person, either:

1. Furnishes entertainments, at his expense, to any meeting of electors previous to or during an election;
2. Pays for, procures, or engages to pay for any such entertainment;
3. Furnishes or engages to pay any money or property for the purpose of procuring the attendance of voters at the polls, or for the purpose of compensating any person for procuring the attendance of voters at the polls, except for the conveyance of voters who are sick or infirm;

4. Furnishes or engages to pay or deliver any money or property for any purpose intended to promote the election of any candidate, except for the expenses of holding and conducting public meetings for the discussion of public questions, and of printing and circulating ballots, handbills, and other papers, previous to such election;

is guilty of a misdemeanor.

History: En. Sec. 74, Pen. C. 1895; re-en. Sec. 8138, Rev. C. 1907; re-en. Sec. 10761, R. C. M. 1921. Cal. Pen. C. Sec. 54.

29 C.J.S. Elections §§ 329, 356.

Treating of voters by candidate for office as violation of corrupt practices or similar act. 2 ALR 402.

Elections⇒317.

94-1416. (10762) Unlawful offer to appoint to office. Every person who, being a candidate at any election, offers, or agrees to appoint or procure, the appointment of any particular person to office, as an inducement or consideration to any person to vote for, or to procure or aid in procuring the election of such candidate, is guilty of a misdemeanor.

History: En. Sec. 75, Pen. C. 1895; re-en. Sec. 8139, Rev. C. 1907; re-en. Sec. 10762, R. C. M. 1921. Cal. Pen. C. Sec. 55.

18 Am. Jur. 334, Elections, § 231.

94-1417. (10763) Communication of same. Every person, not being a candidate, who communicates any offer, made in violation of the last section, to any person, with intent to induce him to vote for, or to procure or to aid in procuring the election of the candidate making the offer, is guilty of a misdemeanor.

History: En. Sec. 76, Pen. C. 1895; re-en. Sec. 8140, Rev. C. 1907; re-en. Sec. 10763, R. C. M. 1921. Cal. Pen. C. Sec. 56.

94-1418. (10764) Bribing members of legislative caucuses, etc. Every person who gives or offers a bribe to any officer or member of any legislative caucus, political convention, or political gathering of any kind, held for the purpose of nominating candidates for offices of honor, trust, or profit, in this state, with intent to influence the person to whom such bribe is given or offered to be more favorable to one candidate than another, and every person, member of either of the bodies in this section mentioned, who receives or offers to receive any such bribe, is punishable by imprisonment in the state prison not less than one nor more than fourteen years.

History: En. Sec. 77, Pen. C. 1895; re-en. Sec. 8141, Rev. C. 1907; re-en. Sec. 10764, R. C. M. 1921. Cal. Pen. C. Sec. 57.

Predicating bribery or cognate offense upon unaccepted offer by or to an official. 52 ALR 816.

Elections⇒316.

29 C.J.S. Elections § 332.

18 Am. Jur. 393, Elections, § 337; see generally, 8 Am. Jur. 885, Bribery.

Statement by candidate regarding salary or fees of office as bribery. 106 ALR 493.
Officer's lack of authority as affecting offense of bribery. 122 ALR 951.

Criminal offense of bribery as affected by lack of legal qualification of person assuming to be an officer. 115 ALR 1263.

94-1419. (10765) Preventing public meetings of electors. Every person who, by threats, intimidations, or violence, wilfully hinders or prevents electors from assembling in public meeting for the consideration of public questions, is guilty of a misdemeanor.

History: En. Sec. 78, Pen. C. 1895; Elections 320.
 re-en. Sec. 8142, Rev. C. 1907; re-en. Sec. 29 C.J.S. Elections § 333.
 10765, R. C. M. 1921. Cal. Pen. C. Sec. 58.

94-1420. (10766) Disturbances of public meetings of electors. Every person who wilfully disturbs or breaks up any public meeting of electors or others, lawfully being held for the purpose of considering public questions, or any public school or public school meeting, is guilty of a misdemeanor.

History: En. Sec. 79, Pen. C. 1895; Disturbance of Public Assemblage 1.
 re-en. Sec. 8143, Rev. C. 1907; re-en. Sec. 27 C.J.S. Disturbance of Public Meetings § 1.
 10766, R. C. M. 1921.

Cross-Reference

Disturbance of school, sec. 75-2409.

94-1421. (10767) Betting on elections. Every person who makes, offers, or accepts any bet or wager upon the result of any election, or upon the success or failure of any person or candidate, or upon the number of votes to be cast, either in the aggregate or for any particular candidate, or upon the vote to be cast by any person, is guilty of a misdemeanor.

History: En. Sec. 80, Pen. C. 1895; Elections 315.
 re-en. Sec. 8144, Rev. C. 1907; re-en. Sec. 29 C.J.S. Elections § 328.
 10767, R. C. M. 1921. Cal. Pen. C. Sec. 60.

94-1422. (10768) Violation of election laws. Every person who wilfully violates any of the provisions of the laws of this state relating to elections is, unless a different punishment for such violation is prescribed by this code, punishable by fine not exceeding one thousand dollars, or by imprisonment in the state prison not exceeding five years, or both.

History: En. Sec. 81, Pen. C. 1895; Elections 332.
 re-en. Sec. 8145, Rev. C. 1907; re-en. Sec. 29 C.J.S. Elections § 353.
 10768, R. C. M. 1921. Cal. Pen. C. Sec. 61.

Cross-Reference

Absent voters' law, violations, secs. 23-1113.
 1318 to 23-1321.

94-1423. (10769) Bribery. The following persons shall be deemed guilty of bribery, and shall be punished by a fine not exceeding one thousand dollars, and imprisonment in the penitentiary not exceeding one year:

1. Every person who, directly or indirectly, by himself or by any other person on his behalf, gives, lends, or agrees to give or lend, or offers or promises, any money or valuable consideration, or promises to procure, or endeavors to procure, any money or valuable consideration, to or for any election, or to or for any person on behalf of any elector, or to or for any person, in order to induce any elector to vote or refrain from voting, or corruptly does any such act as aforesaid;

2. Every person who, directly or indirectly, by himself or by any other person on his behalf, gives, or procures, or agrees to give or procure, or offers or promises, any office, place, or employment, to or for any elector, or to or for any other person, in order to induce such elector to vote or refrain from voting, or corruptly does any such act as aforesaid, on account of any elector having voted or refrained from voting at any election;

3. Every person who, directly or indirectly, by himself or by any other persons on his behalf, makes any gift, loan, offer, promise, procure-

ment, or agreement as aforesaid, to or for any person, in order to induce such person to procure or endeavor to procure the return of any person to serve in the legislative assembly, or the vote of any elector at any election;

4. Every person who, upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procures or promises, or endeavors to procure, the election of any candidate to the legislative assembly, or the vote of any elector at any election;

5. Every person who advances or pays, or causes to be paid, any money to, or to the use of any other person, with the intent that such money, or any part thereof, shall be expended in bribery, or in corrupt practices, at any election, or who knowingly pays, or causes to be paid, any money to any person in discharge or repayment of any money wholly or in part expended in bribery or corrupt practices at any election;

6. Every elector who, before or during any election, directly or indirectly, by himself or any other person on his behalf, receives, agrees, or contracts for any money, gift, loan, valuable consideration, office, place, or employment, for himself or any other person, for voting or agreeing to vote, or for refusing or agreeing to refrain from voting at any election;

7. Every person who, after any election, directly or indirectly, by himself or by any other person in his behalf, receives any money, gift, loan, valuable consideration, office, place, or employment, for having voted or refrained from voting, or having induced any other person to vote or refrain from voting, at any election;

8. Every person, whether an elector or otherwise, who, before or during any election, directly or indirectly, by himself or by any other person on his behalf, makes approaches to any candidate or agent, or any person representing or acting on behalf of any candidate at such election, and asks for, or offers to agree or contract for, any money, gift, loan, valuable consideration, office, place, or employment for himself or any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting at such election;

9. Every person, whether an elector or otherwise, who, after an election, directly or indirectly, by himself or by any other person on his behalf, makes approaches to any candidate, or any agent or person representing or acting on behalf of any candidate, and asks for or offers to receive any money, gift, loan, valuable consideration, office, place, or employment, for himself or any other person, for having voted or refrained from voting, or having induced any other person to vote or refrain from voting at such election;

10. Every person who, in order to induce a person to allow himself to be nominated as a candidate, or to refrain from becoming a candidate, or to withdraw if he has so become, gives or lends any money or valuable consideration whatever, or agrees to give or lend, or offers or promises any such money or valuable consideration, or promises to procure or try to procure, or tries to procure, for such person, or for any other person, any money or valuable consideration;

11. Every person who, for the purpose and with the intent in the last preceding subsection mentioned, gives or procures any office, place, or

employment, or agrees to give or procure, or offers or promises, such office, place, or employment, or endeavors to procure, or promises to procure or to endeavor to procure, such office, place, or employment, to or for such person or any other person;

12. Every person who, in consideration of any gift, loan, offer, promise, or agreement, as mentioned in the two last preceding subsections, allows himself to be nominated, or refuses to allow himself to be nominated, as a candidate at an election, or withdraws if he has been so nominated;

13. Every elector, candidate for nomination, nominee, or political committee who shall pay, or offer to pay, the fee for any person who is about to, or has made his declaration of intention, or has taken out, or is about to take out, his final papers as a citizen of the United States; and every person who receives any money or other valuable thing to pay such fee, or permits the same to be paid for him.

History: En. Sec. 105, Pen. C. 1895; re-en. Sec. 8169, Rev. C. 1907; re-en. Sec. 10769, R. C. M. 1921. Cal. Pen. C. Sec. 54b.

Cross-References

Bribery of electors, sec. 23-918.
Intimidating voters, sec. 94-1411.

References

Cited or applied as section 8169, Revised Codes, in *Cadle v. Town of Baker*, 51 M 176, 181, 149 P 960.

Elections 316.

29 C.J.S. Elections § 332.

18 Am. Jur. 393, Elections, § 337; see generally, 8 Am. Jur. 885, Bribery.

Predicating bribery or cognate offense upon unaccepted offer by or to an official. 52 ALR 816.

Statement by candidate regarding salary or fees of office as bribery. 106 ALR 493.

Criminal offense of bribery as affected by lack of legal qualification of person assuming to be an officer. 115 ALR 1263.

Officer's lack of authority as affecting offense of bribery. 122 ALR 951.

94-1424. (10770) Unlawful acts of employers. It shall be unlawful for any employer, in paying his employees the salary or wages due them, to inclose their pay in "pay envelopes" upon which there is written or printed the name of any candidate or political mottoes, devices, or arguments containing threats or promises, express or implied, calculated or intended to influence the political opinions or actions of such employees. Nor shall it be lawful for an employer, within ninety days of an election, to put up or otherwise exhibit in his factory, workshop, or other establishment or place where his workmen or employees may be working, any handbill or placard containing any threat or promise, notice, or information, that in case any particular ticket or political party, or organization, or candidate, shall be elected, work in his place or establishment will cease, in whole or in part, or shall be continued or increased, or his place or establishment be closed up, or the salaries or wages of his workmen or employees be reduced or increased, or other threats, or promises, express or implied, intended or calculated to influence the political opinions or actions of his workmen or employees. This section shall apply to corporations as well as individuals, and any person violating the provisions of this section is guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, and imprisonment not exceeding six months in the county jail, and any corporation violating this section shall be punished by fine not to exceed five thousand dollars, or forfeit its charter, or both such fine and forfeiture.

History: En. Sec. 109, Pen. C. 1895; Codes, in Cadle v. Town of Baker, 51 M re-en. Sec. 8173, Rev. C. 1907; re-en. Sec. 176, 181, 149 P 960.
10770, R. C. M. 1921.

References

Cited or applied as section 8173, Revised

Elections—317.

29 C.J.S. Elections §§ 329, 350.

18 Am. Jur. 335, 336, Elections, §§ 232, 234.

94-1425. (10771) Fines paid into school fund. All fines imposed and collected under the preceding sections shall be paid into the county treasury for the benefit of the common schools of the county in which the offense was committed.

History: En. Sec. 110, Pen. C. 1895; Codes of 1907 (sections 94-1423 and 94-re-en. Sec. 8174, Rev. C. 1907; re-en. Sec. 1424 of this code).
10771, R. C. M. 1921.

NOTE.—The sections referred to herein were sections 8169 and 8173 of the Revised

Fines—20.

36 C.J.S. Fines § 19.

94-1426. (10772) Violation of act voids election. If it be proved before any court for the trial of election contests or petitions that any corrupt practice has been committed, by or with the actual knowledge and consent of any candidate at an election, if he has been elected, such election shall be void, and shall be so adjudged.

History: En. Sec. 111, Pen. C. 1895; re-en. Sec. 8175, Rev. C. 1907; re-en. Sec. 10772, R. C. M. 1921.

NOTE.—The corrupt practices referred to in this section were those specified in sections 8169 and 8173 of the Revised Codes of 1907 (sections 94-1423 and 94-1424 of this code).

References

Cited or applied as section 111, Penal Code, in State ex rel. Brooks v. Fransham, 19 M 273, 290, 48 P 1; as section 8175, Revised Codes, in Cadle v. Town of Baker, 51 M 176, 181, 149 P 960.

Elections—231.

29 C.J.S. Elections § 216.

94-1427. (10773) Expenditure by or for candidate for office. No sums of money shall be paid, and no expenses authorized or incurred, by or on behalf of any candidate to be paid by him, except such as he may pay to the state for printing, as herein provided, in his campaign for nomination to any public office or position in this state, in excess of fifteen per cent. of one year's compensation or salary of the office for which he is a candidate; provided, that no candidate shall be restricted to less than one hundred dollars in his campaign for such nomination. No sums of money shall be paid, and no expenses authorized or incurred, contrary to the provisions of this act, for or on behalf of any candidate for nomination. For the purposes of this law, the contribution, expenditure, or liability of a descendant, ascendant, brother, sister, uncle, aunt, nephew, niece, wife, partner, employer, employee, or fellow official or fellow employee of a corporation shall be deemed to be that of the candidate himself.

History: En. Sec. 1, Init. Act, Nov. 1912; re-en. Sec. 10773, R. C. M. 1921.

a vacancy in an office for violation of the provisions of such act. State ex rel. Koppers v. District Court, 109 M 287, 292, 96 P 2d 271.

Constitutionality

Held, that under article IX, section 9, of the state constitution, the legislature had the power to authorize the district court, by means of the corrupt practices act (sections 94-1427 to 94-1474), to find

Operation and Effect

While the corrupt practices act is in force by virtue of a vote of the people, it has no greater efficacy as a statute than

if it had been enacted by the legislature. State ex rel. Smith v. District Court, 50 M 134, 138, 145 P 721.

Since this act does not authorize a contest of the election for the location of a county seat, a demurrer to the petition seeking to initiate such a proceeding was properly sustained. Cadle v. Town of Baker, 51 M 176, 181, 149 P 960. See also Poe v. Sheridan County, 52 M 279, 290, 157 P 185.

Held, that if the Corrupt Practices Act applies to county seat elections, the finding of the trial court that contestant failed to prove fraud and corruption on the part of partisans of the successful candidate, in furnishing sandwiches, cake, coffee, etc., at a public meeting and dance a few days before election, and supplying oil and gasoline for automobiles to convey electors to polling places during a snowstorm, no discrimination being made between

those favoring one place or the other, and that such actions did not affect the result, was sustained by the evidence. Atkinson v. Roosevelt County et al., 71 M 165, 184, 227 P 811.

Purpose of Corrupt Practices Act

The purpose of the corrupt practices act, sections 94-1427 to 94-1474, is not only to guarantee the purity of elections and to assure a free exercise of the franchise by the voter, but to protect candidates from the pressure of those who operate at their expense, and by forbidding certain practices, afford them an equal opportunity. Kommers v. Palagi, 111 M 293, 297, 108 P 2d 208.

Elections—231.

29 C.J.S. Elections § 216.

18 Am. Jur. 338, Elections, § 237.

94-1428. (10774) Limitation of expenditures by candidate—by party organizations—by relatives. No sums of money shall be paid and no expenses authorized or incurred by or on behalf of any candidate who has received the nomination to any public office or position in this state, except such as he may contribute towards payment for his political party's or independent statement in the pamphlet herein provided for, to be paid by him in his campaign for election, in excess of ten per cent. of one year's salary or compensation of the office for which he is nominated; provided, that no candidate shall be restricted to less than one hundred dollars. No sum of money shall be paid and no expenses authorized or incurred by or on behalf of any political party or organization to promote the success of the principles or candidates of such party or organization, contrary to the provisions of this act. For the purposes of this act, the contribution, expenditure, or liability of a descendant, ascendant, brother, sister, uncle, aunt, nephew, niece, wife, partner, employer, employee, or fellow official or fellow employee of a corporation, shall be deemed to be that of the candidate himself.

History: En. Sec. 8, Init. Act, Nov. 1912; re-en. Sec. 10774, R. C. M. 1921.

Definition of Terms as Applied to Sheriffs

The words "salary" and "compensation" do not include the value of the living quarters furnished to sheriff by the county, for the furnishing of which there is no provision of law, the amount received for the board of prisoners both federal and state in his charge, nor mileage collected by his office. "By and on behalf" mean by the candidate himself or by someone who acts for him in the sense that an agent acts for and on behalf of his principal, i.e., as his political agent; the authority to so act may be express or implied. Kommers v. Palagi, 111 M 293, 299, 108 P 2d 208.

Illegal Expenditures by Political Club

In an election contest brought under the corrupt practices act, under the evidence presented, including brewery books showing delivery of beer to an alleged political club but actually being ordered and received by a sheriff's deputies, evidence held to sustain findings that illegal expenditures made by an alleged political club were actually those of a candidate running for a second term for sheriff and his deputies, and that they were made by and on his behalf within the meaning of this section. Kommers v. Palagi, 111 M 293, 303, 108 P 2d 208.

18 Am. Jur. 338, Elections, § 237.

94-1429. (10775) Definition of terms. Terms used in this act shall be construed as follows, unless other meaning is clearly apparent from the language or context, or unless such construction is inconsistent with the manifest intent of the law:

"Persons" shall apply to any individual, male or female, and, where consistent with collective capacity, to any committee, firm, partnership, club, organization, association, corporation, or other combination of individuals.

"Candidate" shall apply to any person whose name is printed on an official ballot for public office, or whose name is expected to be or has been presented for public office, with his consent, for nomination or election.

"Political agent" shall apply to any person who, upon request or under agreement, receives or disburses money in behalf of a candidate.

"Political committee" shall apply to every combination of two or more persons who shall aid or promote the success or defeat of a candidate, or a political party or principle, and the provisions of law relating thereto shall apply to any firm or partnership, to any corporation, and to any club, organization, association, or other combination of persons, whether incorporated or not, with similar purposes, whether primary or incidental.

"Public office" shall apply to any national, state, county, or city office to which a salary attaches and which is filled by the voters, as well as to the office of presidential elector, United States senator, or presiding officer of either branch of the legislature.

"Give," "provide," "expend," "contribute," "receive," "ask," "solicit," and like terms, with their corresponding nouns, shall apply to money, its equivalent, or any other valuable thing; shall include the promise, advance deposit, borrowing, or loan thereof, and shall cover all or any part of a transaction, whether it be made directly or indirectly.

None of the provisions of this act shall be construed as relating to the rendering of services by speakers, writers, publishers, or others, for which no compensation is asked or given; nor to prohibit expenditure by committees of political parties or organizations for public speakers, music, halls, lights, literature, advertising, office rent, printing, postage, clerk hire, challengers or watchers at the polls, traveling expenses, telegraphing or telephoning, or making of poll-lists.

History: En. Sec. 10, Init. Act, Nov. 1912; re-en. Sec. 10775, R. C. M. 1921.

References

Cited or applied as section 10, p. 598, Laws of 1913, in *Cadle v. Town of Baker*,

51 M 176, 182, 149 P 960; *State ex rel. Wheeler v. Stewart*, 71 M 358, 361, 230 P 366; *State ex rel. Foster et al. v. Mountjoy*, 83 M 162, 168, 271 P 446; *Kommers v. Palagi*, 111 M 293, 301, 108 P 2d 208.

94-1430. (10776) Statement by candidate as to moneys expended—filing after election—penalty. Every candidate for nomination or election to public office, including candidates for the office of senator of the United States, shall, within fifteen days after the election at which he was a candidate, file with the secretary of state if a candidate for senator of the United States, representative in congress, or for any state or district office in a district composed of one or more counties, or for members of the legislative assembly from a district composed of more than one county, but with the county clerk for legislative districts composed of not more than one

county, and for county and precinct offices, and with the city clerk, auditor, or recorder of the town or city in which he resides, if he was a candidate for a town, city, or ward office, an itemized sworn statement setting forth in detail all the moneys contributed, expended, or promised by him to aid and promote his nomination or election, or both, as the case may be, and for the election of his party candidates, and all existing unfulfilled promises of every character, and all liabilities remaining uncanceled and in force at the time such statement is made, whether such expenditures, promises, and liabilities were made or incurred before, during, or after such election. If no money or other valuable thing was given, paid, expended, contributed, or promised, and no unfulfilled liabilities were incurred by a candidate for public office to aid or promote his nomination or election, or the election of his party candidates, he shall file a statement to that effect within fifteen days after the election at which he was a candidate. Any candidate who shall fail to file such a statement shall be fined twenty-five dollars for every day on which he was in default, unless he shall be excused by the court. Fifteen days after any such election the secretary of state, or county clerk, city clerk, auditor, or recorder, as the case may be, shall notify the county attorney of any failure to file such a statement on the part of any candidate, and within ten days thereafter such prosecuting officer shall proceed to prosecute said candidate for such offense.

History: En. Sec. 11, Init. Act, Nov. 1912; re-en. Sec. 10776, R. C. M. 1921.

Construction and application of statute regarding statement by candidate as to his expenses, or his interest in, or the financial value of publicity through, newspapers or other publicity sources. 103 ALR 1424.

18 Am. Jur. 338, Elections, § 238.

94-1431. (10777) Accounts of expenditures by political committees and other persons—statement and vouchers. Every political committee shall have a treasurer, who is a voter, and shall cause him to keep detailed accounts of all its receipts, payments, and liabilities. Similar accounts shall be kept by every person, who in the aggregate receives or expends money or incurs liabilities to the amount of more than fifty dollars for political purposes, and by every political agent and candidate. Such accounts shall cover all transactions in any way affecting or connected with the political canvass, campaign, nomination, or election concerned. Every person receiving or expending money or incurring liability by authority or in behalf of or to promote the success or defeat of such committee, agent, candidate, or other person or political party or organization, shall, on demand, and in any event within fourteen days after such receipt, expenditure, or incurrance of liability, give such treasurer, agent, candidate, or other person on whose behalf such expense or liability was incurred detailed account thereof, with proper vouchers. Every payment, except payments less in the aggregate than five dollars to any person, shall be vouched for by a receipted bill stating the particulars of expense. Every voucher, receipt, and account hereby required shall be a part of the accounts and files of such treasurer, agent, candidate, or other person, and shall be preserved by the public officer with whom it shall be filed for six months after the election to which it refers. Any person not a candidate for any office or nomination who expends money or value to an amount greater than fifty dollars in any campaign for nomination or election, to aid in the

election or defeat of any candidate or candidates, or party ticket, or measure before the people, shall, within ten days after the election in which said money or value was expended, file with the secretary of state in the case of a measure voted upon by the people, or of state or district offices for districts composed of one or more counties, or with the county clerk for county offices, and with the city clerk, auditor, or recorder for municipal offices, an itemized statement of such receipts and expenditures and vouchers for every sum paid in excess of five dollars, and shall at the same time deliver to the candidate or treasurer of the political organization whose success or defeat he has sought to promote, a duplicate of such statement and a copy of such vouchers. The books of account of every treasurer of any political party, committee, or organization, during an election campaign, shall be open at all reasonable office hours to the inspection of the treasurer and chairman of any opposing political party or organization for the same electoral district; and his right of inspection may be enforced by writ of mandamus by any court of competent jurisdiction.

History: En. Sec. 12, Init. Act, Nov. 1912; re-en. Sec. 10777, R. C. M. 1921.

94-1432. (10778) Copies of act to be furnished certain public officers and candidates. The secretary of state shall, at the expense of the state, furnish to the county clerk, and to the city and town clerks, auditors, and recorders, copies of this act as a part of the election laws. In the filing of a nomination petition or certificate of nomination, the secretary of state, in the case of state and district offices for districts composed of one or more counties, and county clerks for county offices, and the city and town clerks, auditors, or recorders for municipal offices, shall transmit to the several candidates, and to the treasurers of political committees, and to political agents, as far as they may be known to such officer, copies of this act, and also to any other person required to file a statement such copies shall be furnished upon application therefor. Upon his own information, or at the written request of any voter, said secretary of state shall transmit to any other person believed by him or averred to be a candidate, or who may otherwise be required to make a statement, a copy of this act.

History: En. Sec. 13, Init. Act, Nov. 1912; re-en. Sec. 10778, R. C. M. 1921. States 673. 59 C.J. States § 142.

94-1433. (10779) Inspection of accounts—complaints—statement of receipts. The several officers with whom statements are required to be filed shall inspect all statements of accounts and expenses relating to nominations and elections filed with them within ten days after the same are filed; and if, upon examination of the official ballot, it appears that any person has failed to file a statement as required by law, or if it appears to any such officer that the statement filed with him does not conform to law, or upon complaint in writing by a candidate or by a voter that a statement filed does not conform to law or to the truth, or that any person has failed to file a statement which he is by law required to file, said officer shall forthwith in writing notify the delinquent person. Every such complaint filed by a citizen or candidate shall state in detail the grounds of

objection, shall be sworn to by the complainant, and shall be filed with the officer within sixty days after the filing of the statement or amended statement. Upon the written request of a candidate or any voter, filed within sixteen days after any convention, primary, or nominating election, said secretary of state, county clerk, city or town clerk, auditor, or recorder, as the case may be, shall demand from any specified person or candidate a statement of all his receipts, and from whom received, disbursements and liabilities in connection with or in any way relating to the nomination or election concerned, whether it is an office to which a salary or compensation is attached or not, and said person shall thereupon be required to file such statement and to comply with all the provisions relating to statements herein contained. Whoever makes a statement required by this act shall make oath attached thereto that it is in all respects correct, complete, and true, to the best of his knowledge and belief, and said verification shall be in substantially the form herein provided.

History: En. Sec. 14, Init. Act, Nov. 1912; re-en. Sec. 10779, R. C. M. 1921.

94-1434. (10780) Prosecutions for failure to file statement. Upon the failure of any person to file a statement within ten days after receiving notice, under the preceding section, or if any statement filed as above discloses any violation of any provision of this act relating to corrupt practices in elections, or in any other provision of the election laws, the secretary of state, the county clerk, or the city clerk, auditor, or recorder, as the case may be, shall forthwith notify the county attorney of the county where said violation occurred, and shall furnish him with copies of all papers relating thereto, and said county attorney shall, within sixty days thereafter, examine every such case, and if the evidence seems to him to be sufficient under the provisions of this act, he shall, in the name of the state, forthwith institute such civil or criminal proceedings as may be appropriate to the facts.

History: En. Sec. 15, Init. Act, Nov. 1912; re-en. Sec. 10780, R. C. M. 1921.

94-1435. (10781) Jurisdiction—court may compel filing of statements. The district court of the county in which any statement of accounts and expenses relating to nominations and elections should be filed, unless herein otherwise provided, shall have exclusive original jurisdiction of all violations of this act, and may compel any person who fails to file such a statement as required by this act, or who files a statement which does not conform to the provisions of this act in respect to its truth, sufficiency in detail, or otherwise, to file a sufficient statement, upon the application of the attorney-general or of the county attorney, or the petition of a candidate or of any voter. Such petition shall be filed in the district court within sixty days after such election if the statement was filed within the fifteen days required, but such a petition may be filed within thirty days after any payment not included in the statement so filed.

History: En. Sec. 16, Init. Act, Nov. 1912; re-en. Sec. 10781, R. C. M. 1921.

94-1436. (10782) Record of statements—copies. All statements shall be preserved for six months after the election to which they relate, and shall

be public records subject to public inspection, and it shall be the duty of the officers having custody of the same to give certified copies thereof in like manner as of other public records.

History: En. Sec. 17, Init. Act, Nov. 1912; re-en. Sec. 10782, R. C. M. 1921; amd. Sec. 1, Ch. 41, L. 1943.

94-1437. (10783) Payments in name of undisclosed principal. No person shall make a payment of his own money or of another person's money to any other person in connection with a nomination or election in any other name than that of the person who in truth supplies such money; nor shall any person knowingly receive such payment, or enter, or cause the same to be entered, in his accounts or records in another name than that of the person by whom it was actually furnished; provided, if the money be received from the treasurer of any political organization, it shall be sufficient to enter the same as received from said treasurer.

History: En. Sec. 18, Init. Act, Nov. 1912; re-en. Sec. 10783, R. C. M. 1921.

94-1438. (10784) Promise to procure appointment or election. No person shall, in order to aid or promote his nomination or election, directly or indirectly, himself or through any other person, promise to appoint another person, or promise to secure or aid in securing the appointment, nomination, or election of another person to any public or private position or employment, or to any position of honor, trust, or emolument, except that he may publicly announce or define what is his choice or purpose in relation to any election in which he may be called to take part, if elected, and if he is a candidate for nomination or election as a member of the legislative assembly, he may pledge himself to vote for the people's choice for United States senator, or state what his action will be on such vote.

History: En. Sec. 19, Init. Act, Nov. 18 Am. Jur. 334, Elections, § 231. 1912; re-en. Sec. 10784, R. C. M. 1921.

94-1439. (10785) Public officer or employee not to contribute funds. No holder of a public position or office, other than an office filled by the voters, shall pay or contribute to aid or promote the nomination or election of any other person to public office. No person shall invite, demand, or accept payment or contribution from such holder of a public position or office for campaign purposes.

History: En. Sec. 20, Init. Act, Nov. 1912; re-en. Sec. 10785, R. C. M. 1921.

94-1440. (10786) Certain public officers prohibited from acting as delegates or members of political committee. No holder of a public position, other than an office filled by the voters, shall be a delegate to a convention for the election district that elects the officer or board under whom he directly or indirectly holds such position, nor shall he be a member of a political committee for such district.

History: En. Sec. 21, Init. Act, Nov. 1912; re-en. Sec. 10786, R. C. M. 1921.

When Mandamus Lies to Compel Magistrate's Disposal

Held, on application for writ of manda-

mus to compel a justice of the peace to dispose of an accusation brought under this section, that the writ will issue commanding the justice to take action by either issuing a warrant of arrest or dismissing the complaint where two weeks

expired before examination of the accuser and two months in examining six witnesses to ascertain whether a violation was probable or not, but it will not issue to con-

trol his discretion, i.e., to issue a warrant of arrest. State ex rel. Vanek v. Justice Court, 110 M 550, 554, 104 P 2d 14.

94-1441. (10787) Transfer of convention credential. No person shall invite, offer, or effect the transfer of any convention credential in return for any payment of money or other valuable thing.

History: En. Sec. 22, Init. Act, Nov. 1912; re-en. Sec. 10787, R. C. M. 1921.

94-1442. (10788) Inducing person to be or not to be candidate. No person shall pay, or promise to reward another, in any manner or form, for the purpose of inducing him to be or refrain from or cease being a candidate, and no person shall solicit any payment, promise, or reward from another for such purpose.

History: En. Sec. 23, Init. Act, Nov. 1912; re-en. Sec. 10788, R. C. M. 1921. Elections 230. 29 C.J.S. Elections § 218.

94-1443. (10789) What demands or requests shall not be made of candidates. No person shall demand, solicit, ask, or invite any payment or contribution for any religious, political, charitable, or other cause or organization supposed to be primarily or principally for the public good, from a person who seeks to be or has been nominated or elected to any office; and no such candidate or elected person shall make any such payment or contribution if it shall be demanded or asked during the time he is a candidate for nomination or election to or an incumbent of any office. No payment or contribution for any purpose shall be made a condition precedent to the putting of a name on any caucus or convention ballot or nomination paper or petition, or to the performance of any duty imposed by law on a political committee. No person shall demand, solicit, ask, or invite any candidate to subscribe to the support of any club or organization, to buy tickets to any entertainment or ball, or to subscribe for or pay for space in any book, program, periodical, or other publication; if any candidate shall make any such payment or contribution with apparent hope or intent to influence the result of the election, he shall be guilty of a corrupt practice; but this section shall not apply to the soliciting of any business advertisement for insertion in a periodical in which such candidate was regularly advertising prior to his candidacy, nor to ordinary business advertising, nor to his regular payment to any organization, religious, charitable, or otherwise, of which he may have been a member, or to which he may have been a contributor, for more than six months before his candidacy, nor to ordinary contributions at church services.

History: En. Sec. 24, Init. Act, Nov. 1912; re-en. Sec. 10789, R. C. M. 1921.

Treating of voters by candidate for office as violation of corrupt practices or similar acts. 2 ALR 402.

Elections 231.

29 C.J.S. Elections § 216.

18 Am. Jur. 336, Elections, §§ 235 et seq.

Construction of statute prohibiting solicitation or acceptance of contributions or subscriptions by public officer or employee. 85 ALR 1146.

94-1444. (10790) Contributions from corporations, public utilities and others. No corporation, and no person, trustee, or trustees owning or holding the majority of the stock of a corporation carrying on the business of a

bank, savings bank, co-operative bank, trust, trustee, surety, indemnity, safe deposit, insurance, railroad, street-railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, water, cemetery, or crematory company, or any company having the right to take or condemn land, or to exercise franchises in public ways granted by the state or by any county, city, or town, shall pay or contribute in order to aid, promote, or prevent the nomination or election of any person, or in order to aid or promote the interests, success, or defeat of any political party or organization. No person shall solicit or receive such payment or contribution from such corporation or such holders of a majority of such stock.

History: En. Sec. 25, Init. Act, Nov. 1912; re-en. Sec. 10790, R. C. M. 1921.

Construction and application of provisions of corrupt practices act regarding contributions by corporations. 125 ALR 1029.

18 Am. Jur. 396, Elections, § 341.

94-1445. (10791) Treating. Any person or candidate who shall, either by himself or by any other person, either before or after an election, or while such person or candidate is seeking a nomination or election, directly or indirectly, give or provide, or pay, wholly or in part, the expenses of giving or providing any meat or drink, or other entertainment or provision, clothing, liquors, cigars, or tobacco, to or for any person for the purpose of or with intent or hope to influence that person, or any other person, to give or refrain from giving his vote at such election to or for any candidate or political party ticket, or measure before the people, or on account of such persons, or any other person, having voted or refrained from voting for any candidate or the candidates of any political party or organization or measure before the people, or being about to vote or refrain from voting at such election, shall be guilty of treating. Every elector who accepts or takes any such meat, drink, entertainment, provision, clothing, liquors, cigars, or tobacco, shall also be guilty of treating; and such acceptance shall be a ground of challenge to his vote and of rejecting his vote on a contest.

History: En. Sec. 26, Init. Act, Nov. 1912; re-en. Sec. 10791, R. C. M. 1921.

Treating of voters by candidate for office as violation of corrupt practices or similar acts. 2 ALR 402.

18 Am. Jur. 335, Elections, § 233.

94-1446. (10792) Challenging voters—procedure. Whenever any person's right to vote shall be challenged, and he has taken the oath prescribed by the statutes, and if it is at a nominating election, then it shall be the duty of the clerks of election to write in the poll-books at the end of such person's name the words "challenged and sworn," with the name of the challenger. Thereupon the chairman of the board of judges shall write upon the back of the ballot offered by such challenged voter the number of his ballot, in order that the same may be identified in any future contest of the results of the election, and be cast out if it shall appear to the court to have been for any reason wrongfully or illegally voted for any candidate or on any question. And such marking of the name of such challenged voter, nor the testimony of any judge or clerk of election in reference thereto, or in reference to the manner in which said challenged person voted, if said testimony shall be given in the course of any contest, investigation, or

trial wherein the legality of the vote of such person is questioned for any reason, shall not be deemed a violation of section 94-1407.

History: En. Sec. 27, Init. Act, Nov. 1912; re-en. Sec. 10792, R. C. M. 1921.

29 C.J.S. Elections § 209.

See generally, 31 Am. Jur. 389, Judicial Sales.

Elections⇒223.

94-1447. (10793) Coercion or undue influence of voters. Every person who shall, directly or indirectly, by himself or any other person in his behalf, make use of or threaten to make use of any force, coercion, violence, restraint, or undue influence, or inflict or threaten to inflict, by himself or any other person, any temporal or spiritual injury, damage, harm, or loss upon or against any person in order to induce or compel such person to vote or refrain from voting for any candidate, or the ticket of any political party, or any measure before the people, or any person who, being a minister, preacher, or priest, or any officer of any church, religious or other corporation or organization, otherwise than by public speech or print, shall urge, persuade, or command any voter to vote or refrain from voting for or against any candidate or political party ticket or measure submitted to the people, for or on account of his religious duty, or the interest of any corporation, church, or other organization, or who shall, by abduction, duress, or any fraudulent contrivance, impede or prevent the free exercise of the franchise by any voter at any election, or shall thereby compel, induce, or prevail upon any elector to give or to refrain from giving his vote at any election, shall be guilty of undue influence, and shall be punished as for a corrupt practice.

History: En. Sec. 28, Init. Act, Nov. 1912; re-en. Sec. 10793, R. C. M. 1921.

Elections⇒234, 320.

29 C.J.S. Elections §§ 215, 220, 333.

18 Am. Jur. 336, Elections, § 234.

94-1448. (10794) Bets or wagers on election results. Any candidate who, before or during any election campaign, makes any bet or wager of anything of pecuniary value, or in any manner becomes a party to any such bet or wager on the result of the election in his electoral district, or in any part thereof, or on any event or contingency relating to any pending election, or who provides money or other valuables to be used by any person in betting or wagering upon the results of any impending election, shall be guilty of a corrupt practice. Any person who, for the purpose of influencing the result of any election, makes any bet or wager of anything of pecuniary value on the result of such election in his electoral district, or any part thereof, or of any pending election, or on any event or contingency relating thereto, shall be guilty of a corrupt practice, and in addition thereto any such act shall be ground of challenge against his right to vote.

History: En. Sec. 29, Init. Act, Nov. 1912; re-en. Sec. 10794, R. C. M. 1921.

Elections⇒228.

29 C.J.S. Elections § 215.

18 Am. Jur. 394, Elections, § 338.

94-1449. (10795) Personating another elector—penalty. Any person shall be deemed guilty of the offense of personation who, at any election, applies for a ballot in the name of some other person, whether it be that of a person living or dead, or of a fictitious person, or who, having voted once at an election, applies at the same election for a ballot in his own name; and on conviction thereof such person shall be punished by imprisonment in

the penitentiary at hard labor for not less than one nor more than three years.

History: En. Sec. 30, Init. Act, Nov. 1912; re-en. Sec. 10795, R. C. M. 1921. Elections 232. 29 C.J.S. Elections § 217.

94-1450. (10796) Corrupt practice, what constitutes. Any person shall be guilty of a corrupt practice, within the meaning of this act, if he expends any money for election purposes contrary to the provisions of any statute of this state, or if he is guilty of treating, undue influence, personation, the giving or promising to give, or offer of any money or valuable thing to any elector, with intent to induce such elector to vote for or to refrain from voting for any candidate for public office, or the ticket of any political party or organization, or any measure submitted to the people, at any election, or to register or refrain from registering as a voter at any state, district, county, city, town, village, or school district election for public offices or on public measures. Such corrupt practice shall be deemed to be prevalent when instances thereof occur in different election districts similar in character and sufficient in number to convince the court before which any case involving the same may be tried that they were general and common, or were pursuant to a general scheme or plan.

History: En. Sec. 31, Init. Act, Nov. 1912; re-en. Sec. 10796, R. C. M. 1921. right of free speech. Tipton v. Sands, 103 M 1, 9, 10, 60 P 2d 662.

Articles Held of Value

Finding of the trial court that "handy menders" containing needles and thread bearing the name of a candidate for office charged with violation of the corrupt practices act, sections 94-1427 to 94-1474, as well as pencils, were articles of value within the meaning of this section prohibiting the giving of any money or valuable thing with intent to induce him to vote for a candidate for office upheld. Large quantities of beer by the bottle and keg, cigarettes, snuff, and smoking tobacco by the package, chewing tobacco by the plug, purchased and distributed by defendant or his agents, held to sustain the finding. *Kommers v. Palagi*, 111 M 293, 309, 108 P 2d 208.

Constitutionality

Held, that the district court has jurisdiction to entertain a proceeding for removal of state officer for violation of the corrupt practices act (section 94-1450 et seq.) to determine the validity of his election, as against contention that the act contravenes the provisions of article V, section 17, relative to impeachment, and article III, section 10, relative to the

Offering to Serve at Less Salary

The general rule is that offers made and statements published by a candidate for public office that, if elected, he will serve for a smaller salary than that fixed by law, are violative of the corrupt practices acts and constitute bribery under the common law. *Tipton v. Sands*, 103 M 1, 11, 60 P 2d 662.

18 Am. Jur. 336, Elections, §§ 235 et seq.

Treating of voters by candidate for office as violation of corrupt practices or similar acts. 2 ALR 402.

Constitutionality of corrupt practices acts. 69 ALR 377.

Construction of statute prohibiting solicitation or acceptance of contributions or subscriptions by public officer or employee. 85 ALR 1146.

Statements by candidates regarding salaries or fees of office as violation of corrupt practices acts or bribery. 100 ALR 493.

Construction and application of provisions of corrupt practices act regarding contributions by corporations. 125 ALR 1029.

94-1451. (10797) Compensating voter for loss of time—badges and insignia. It shall be unlawful for any person to pay another for any loss or damage due to attendance at the polls, or in registering, or for the expense of transportation to or from the polls. No person shall pay for personal service to be performed on the day of a caucus, primary, convention, or any election, for any purpose connected therewith, tending in any way,

directly or indirectly, to affect the result thereof, except for the hiring of persons whose sole duty is to act as challengers and watch the count of official ballots. No person shall buy, sell, give, or provide any political badge, button, or other insignia to be worn at or about the polls on the day of any election, and no such political badge, button, or other insignia shall be worn at or about the polls on any election day.

History: En. Sec. 32, Init. Act, Nov. 1912; re-en. Sec. 10797, R. C. M. 1921.

94-1452. (10798) Publications in newspapers and periodicals. No publisher of a newspaper or other periodical shall insert, either in its advertising or reading columns, any paid matter which is designed or tends to aid, injure, or defeat any candidate or any political party or organization, or measure before the people, unless it is stated therein that it is a paid advertisement, the name of the chairman or secretary, or the names of the other officers of the political or other organization inserting the same, or the name of some voter who is responsible therefor, with his residence and the street number thereof, if any, appear in such advertisement in the nature of a signature. No person shall pay the owner, editor, publisher, or agent of any newspaper or other periodical to induce him to editorially advocate or oppose any candidate for nomination or election, and no such owner, editor, publisher, or agent shall accept such payment. Any person who shall violate any of the provisions of this section shall be punished as for a corrupt practice.

History: En. Sec. 33, Init. Act, Nov. Elections 231, 317.
1912; re-en. Sec. 10798, R. C. M. 1921.

29 C.J.S. Elections §§ 216, 329, 356.

94-1453. (10799) Solicitation of votes on election day. It shall be unlawful for any person at any place on the day of any election to ask, solicit, or in any manner try to induce or persuade any voter on such election day to vote for or refrain from voting for any candidate, or the candidates or ticket of any political party or organization, or any measure submitted to the people, and upon conviction thereof he shall be punished by fine of not less than five dollars nor more than one hundred dollars for the first offense, and for the second and each subsequent offense occurring on the same or different election days, he shall be punished by fine as aforesaid, or by imprisonment in the county jail for not less than five nor more than thirty days, or by both such fine and imprisonment.

History: En. Sec. 34, Init. Act, Nov. Elections 231, 317.
1912; re-en. Sec. 10799, R. C. M. 1921.

29 C.J.S. Elections §§ 216, 329, 356.
18 Am. Jur. 336, Elections, § 235.

94-1454. (10800) Political criminal libel. It shall be unlawful to write, print, or circulate through the mails or otherwise any letter, circular, bill, placard, or poster relating to any election or to any candidate at any election, unless the same shall bear on its face the name and address of the author, and of the printer and publisher thereof; and any person writing, printing, publishing, circulating, posting, or causing to be written, printed, circulated, posted, or published any such letter, bill, placard, circular, or poster as aforesaid, which fails to bear on its face the name and address of the author and of the printer or publisher, shall be guilty of an illegal practice, and shall on conviction thereof be punished by a fine of not less than

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ten dollars nor more than one thousand dollars. If any letter, circular, poster, bill, publication, or placard shall contain any false statement or charges reflecting on any candidate's character, morality, or integrity, the author thereof, and every person printing or knowingly assisting in the circulation, shall be guilty of political criminal libel, and upon conviction thereof shall be punished by imprisonment in the penitentiary for not less than one nor more than three years. If the person charged with such crime shall prove on his trial that he had reasonable ground to believe such charge was true, and did believe it was true, and that he was not actuated by malice in making such publication, it shall be a sufficient defense to such charge. But in that event, and as a part of such defense, the author and the printer or publisher or other person charged with such crime shall also prove that, at least fifteen days before such letter, circular, poster, bill, or placard containing such false statement or statements was printed or circulated, he or they caused to be served personally and in person upon the candidate to whom it relates a copy thereof in writing, and calling his attention particularly to the charges contained therein, and that, before printing, publishing, or circulating such charges, he received and read any denial, defense, or explanation, if any, made or offered to him in writing by the accused candidate within ten days after the service of such charge upon the accused person.

History: En. Sec. 35, Init. Act, Nov. 1912; re-en. Sec. 10800, R. C. M. 1921.

Libel and slander: defamation of one in his character as a political leader or "boss." 55 ALR 854.

Libel and Slander—146, 149; Railroads —137.

37 C.J. Libel and Slander §§ 642, 645; 52 C.J. Railroads § 1838.

18 Am. Jur. 395, Elections, § 340.

Constitutionality and construction of statutes relating to charges and attacks on candidates for nomination or election to public office. 96 ALR 582.

94-1455. (10801) Filing of statement of expenses by candidate. The name of a candidate chosen at a primary nominating election, or otherwise, shall not be printed on the official ballot for the ensuing election, unless there has been filed by or on behalf of said candidate the statements of accounts and expenses relating to nominations required by this act, as well as a statement by his political agent and by his political committee or committees in his behalf, if his statement discloses the existence of such agent, committee, or committees. The officer or board entrusted by law with the preparation of the official ballots for any election shall, as far as practicable, warn candidates of the danger of the omission of their names by reason of this provision, but delay in making any such statement beyond the time prescribed shall not preclude its acceptance or prevent the insertion of the name on the ballot, if there is reasonable time therefor after the receipt of such statements. Any such vacancy on the ballot shall be filled by the proper committee of his political party in the manner authorized by law, but not by the use of the name of the candidate who failed to file such statements. No person shall receive a certificate of election until he shall have filed the statements required by this act.

History: En. Sec. 36, Init. Act, Nov. 1912; re-en. Sec. 10801, R. C. M. 1921.

18 Am. Jur. 338, Elections, § 238.

Construction and application of statute

regarding statement by candidate as to his expenses, or his interest in, or the financial value of publicity through, newspapers or other publicity sources. 103 ALR 1424.

94-1456. (10802) Inducement to accept or decline nomination. It shall be unlawful for any person to accept, receive, or pay money or any valuable consideration for becoming or for refraining from becoming a candidate for nomination or election, or by himself or in combination with any other person or persons to become a candidate for the purpose of defeating the nomination or election of any other person, and not with a bona fide intent to obtain the office. Upon complaint made to any district court, if the judge shall be convinced that any person has sought the nomination, or seeks to have his name presented to the voters as a candidate for nomination by any political party, for any mercenary or venal consideration or motive, and that his candidacy for the nomination is not in good faith, the judge shall forthwith issue his writ of injunction restraining the officer or officers whose duty it is to prepare the official ballots for such nominating election from placing the name of such person thereon as a candidate for nomination to any office. In addition thereto, the court shall direct the county attorney to institute criminal proceedings against such person or persons for corrupt practice, and upon conviction thereof he and any person or persons combining with him shall be punished by a fine of not more than one thousand dollars, or imprisonment in the county jail for not more than one year.

History: En. Sec. 37, Init. Act, Nov. 1912; re-en. Sec. 10802, R. C. M. 1921.

References

Cited or applied as section 37, Laws of 1913, in *Cadle v. Town of Baker*, 51 M 176, 181, 149 P 960.

94-1457. (10803) Forfeiture of nomination or office for violation of law, when not worked. Where, upon the trial of any action or proceeding under the provisions of this act for the contest of the right of any person declared nominated or elected to any office, or to annul or set aside such nomination or election, or to remove a person from his office, it appears from the evidence that the offense complained of was not committed by the candidate, or with his knowledge or consent, or was committed without his sanction or connivance, and that all reasonable means for preventing the commission of such offense at such election were taken by and on behalf of the candidate, or that the offense or offenses complained of were trivial, unimportant, and limited in character, and that in all other respects his participation in the election was free from such offenses or illegal acts, or that any act or omission of the candidate arose from inadvertence or from accidental miscalculation, or from some other reasonable cause of a like nature, and in any case did not arise from any want of good faith, and under the circumstances it seems to the court to be unjust that the said candidate shall forfeit his nomination or office, or be deprived of any office of which he is the incumbent, then the nomination or election of such candidate shall not by reason of such offense or omission complained of be void, nor shall the candidate be removed from or deprived of his office.

History: En. Sec. 38, Init. Act, Nov. 1912; re-en. Sec. 10803, R. C. M. 1921.

176, 182, 149 P 960; *State ex rel. Palagi v. Regan*, 113 M 343, 353, 126 P 2d 818.

References

Cited or applied as section 38, Laws of 1913, in *Cadle v. Town of Baker*, 51 M

Elections 231; *Officers* 27, 64.

29 C.J.S. *Elections* § 216; 46 C.J. *Officers* §§ 57, 141.

94-1458. (10804) Punishment for violation of act. If, upon the trial of any action or proceeding under the provisions of this act, for the contesting of the right of any person declared to be nominated to an office, or elected to an office, or to annul and set aside such election, or to remove any person from his office, it shall appear that such person was guilty of any corrupt practice, illegal act, or undue influence, in or about such nomination or election, he shall be punished by being deprived of the nomination or office, as the case may be, and the vacancy therein shall be filled in the manner provided by law. The only exception to this judgment shall be that provided in the preceding section of this act. Such judgment shall not prevent the candidate or officer from being proceeded against by indictment or criminal information for any such act or acts.

History: En. Sec. 39, Init. Act, Nov. 1912; re-en. Sec. 10804, R. C. M. 1921.

Not a Criminal Proceeding Requiring Trial by Jury

Though this act speaks of the defendant as the "guilty" person and his "punishment," the proceeding is not criminal in nature but is a special one exempt from the constitutional requirement of trial by jury. The purpose of the act is to secure

the purity of elections under article IV, section 9, const. and contest the right of one elected to office because of a violation, and effect his removal. State ex rel. Palagi v. Regan, 113 M 343, 353, 126 P 2d 818.

References

Cited or applied as section 39, Laws of 1913, in Cadle v. Town of Baker, 51 M 176, 182, 149 P 960.

94-1459. (10805) Time for commencing contest. Any action to contest the right of any person declared elected to an office, or to annul and set aside such election, or to remove from or deprive any person of an office of which he is the incumbent, for any offense mentioned in this act, must, unless a different time be stated, be commenced within forty days after the return day of the election at which such offense was committed, unless the ground of the action or proceeding is for the illegal payment of money or other valuable thing subsequent to the filing of the statements prescribed by this act, in which case the action or proceeding may be commenced within forty days after the discovery by the complainant of such illegal payment. A contest of the nomination or office of governor or representative or senator in congress must be commenced within twenty days after the declaration of the result of the election, but this shall not be construed to apply to any contest before the legislative assembly.

History: En. Sec. 40, Init. Act, Nov. 1912; re-en. Sec. 10805, R. C. M. 1921.

No Application to County Commissioner Election Contest Based on Two Year Residence Requirement

Held, that this section has no application to an election contest involving the office of county commissioner based on the ground that contestee had not resided in the commissioner's district for two years prior to becoming a candidate, the word "offense" as used in the act being synonymous with crime, and no element of crime

being involved in such a contest. Snyder v. Boulware, 109 M 427, 430, 96 P 2d 913.

References

Cited or applied as section 40, Laws of 1913, in Cadle v. Town of Baker, 51 M 176, 182, 149 P 960; State ex rel. Stone v. District Court, 103 M 515, 518, 63 P 2d 147.

Elections—278.

29 C.J.S. Elections § 258.

18 Am. Jur. 368, Elections, § 290.

94-1460. (10806) Court having jurisdiction of proceedings. An application for filing a statement, payment of a claim, or correction of an error or false recital in a statement filed, or an action or proceeding to annul and set

aside the election of any person declared elected to an office, or to remove or deprive any person of his office for an offense mentioned in this act, or any petition to excuse any person or candidate in accordance with the power of the court to excuse as provided in section 94-1457, must be made or filed in the district court of the county in which the certificate of his nomination as a candidate for the office to which he is declared nominated or elected is filed, or in which the incumbent resides.

History: En. Sec. 41, Init. Act, Nov. Elections—231, 277.
1912; re-en. Sec. 10806, R. C. M. 1921. 29 C.J.S. Elections §§ 216, 253.
18 Am. Jur. 365, Elections, §§ 284 et seq.

94-1461. (10807) Repealed—Chapter 50, laws of 1947.

94-1462. (10808) Duty of county attorney on violation of act—penalty for neglect or refusal to act. If any county attorney shall be notified by any officer or other person of any violation of any of the provisions of this act within his jurisdiction, it shall be his duty forthwith to diligently inquire into the facts of such violation, and if there is reasonable ground for instituting a prosecution, it shall be the duty of such county attorney to file a complaint or information in writing, before a court of competent jurisdiction, charging the accused person with such offense; if any county attorney shall fail or refuse to faithfully perform any duty imposed upon him by this act, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall forfeit his office. It shall be the duty of the county attorney, under penalty of forfeiture of his office, to prosecute any and all persons guilty of any violation of the provisions of this act, the penalty of which is fine or imprisonment, or both, or removal from office.

History: En. Sec. 43, Init. Act, Nov. District and Prosecuting Attorneys—
1912; re-en. Sec. 10808, R. C. M. 1921. 2 (5), 8.
27 C.J.S. District and Prosecuting Attorneys §§ 6, 7, 9, 10, 14.

94-1463. (10809) Declaration of result of election after rejection of illegal votes. If, in any case of a contest on the ground of illegal votes, it appears that another person than the one returned has the highest number of legal votes, after the illegal votes have been eliminated, the court must declare such person nominated or elected, as the case may be.

History: En. Sec. 44, Init. Act, Nov. Elections—303.
1912; re-en. Sec. 10809, R. C. M. 1921. 29 C.J.S. Elections §§ 302-305, 307.

94-1464. (10810) Grounds for contest of nomination or office. Any elector of the state, or of any political or municipal division thereof, may contest the right of any person to any nomination or office for which such elector has the right to vote, for any of the following causes:

1. On the ground of deliberate, serious, and material violation of any of the provisions of this act, or of any other provision of the law relating to nominations or elections.
2. When the person whose right was contested was not, at the time of the election, eligible to such office.
3. On account of illegal votes or an erroneous or fraudulent count or canvass of votes.

History: En. Sec. 45, Init. Act, Nov. 1912; re-en. Sec. 10810, R. C. M. 1921.

Operation and Effect

This section permits a nomination as well as an election to be made the subject of contest, and in this respect extends the law upon the subject. This addition was doubtless made in anticipation that the general primary election law would be adopted. *Cadle v. Town of Baker*, 51 M 176, 181, 149 P 960.

Proper Procedure Where Contestee Has Not Assumed Office

Where an election contest involving the office of county commissioner was commenced before the contestee had assumed office, he may not be said to have usurped, intruded into, unlawfully held or exercised the office, within the meaning of section 93-6401, prescribing when quo warranto may be brought, and the action based on the ground that the contestee was ineligible was properly brought under this section. *Snyder v. Boulware*, 109 M 427, 431, 96 P 2d 913.

Who Qualified to Institute Contest

Under this section, one who had been a resident of a county for 25 years, registered as a qualified elector in a certain precinct, in a county commissioner district, and who voted in such precinct, was qualified to bring an action contesting the right of a commissioner elected in such district to hold the office to which he was elected, on the ground that he had not been a resident in the district for two years prior to the time he became a candidate for the office (section 4, article XVI, constitution). *Snyder v. Boulware*, 109 M 427, 430, 96 P 2d 913.

References

State ex rel. *Stone v. District Court*, 103 M 515, 518, 63 P 2d 147; State ex rel. *Palagi v. Regan*, 113 M 343, 352, 353, 126 P 2d 818.

Elections ⇨ 271.

29 C.J.S. Elections §§ 249, 250.

18 Am. Jur. 363, Elections, § 278.

94-1465. (10811) Nomination or election not to be vacated, when. Nothing in the third ground of contest specified in the preceding section is to be so construed as to authorize a nomination or election to be set aside on account of illegal votes, unless it appear, either that the candidate or nominee whose right is contested had knowledge of or connived at such illegal votes, or that the number of illegal votes given to the person whose right to the nomination or office is contested, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same nomination or office, after deducting therefrom the illegal votes which may be shown to have been given to such other person.

History: En. Sec. 46, Init. Act, Nov. 1912; re-en. Sec. 10811, R. C. M. 1921.

94-1466. (10812) Reception of illegal votes, allegations and evidence. When the reception of illegal votes is alleged as a cause of contest, it shall be sufficient to state generally that in one or more specified voting precincts illegal votes were given to the person whose nomination or election is contested, which, if taken from him, will reduce the number of his legal votes below the number of legal votes given to some other person for the same office; but no testimony shall be received of any illegal votes, unless the party contesting such election deliver to the opposite party, at least three days before such trial, a written list of the number of illegal votes, and by whom given, which he intends to prove on such trial. This provision shall not prevent the contestant from offering evidence of illegal votes not included in such statement, if he did not know and by reasonable diligence was unable to learn of such additional illegal votes, and by whom they were given, before delivering such written list.

History: En. Sec. 47, Init. Act, Nov. 1912; re-en. Sec. 10812, R. C. M. 1921.

Elections 285 (3, 4), 293 (1).
29 C.J.S. Elections §§ 268, 276, 278, 280, 282.

94-1467. (10813) Contents of contest petition—amendment—bond—costs—citation—precedence. Any petition contesting the right of any person to a nomination or election shall set forth the name of every person whose election is contested, and the grounds of the contest, and shall not thereafter be amended, except by leave of the court. Before any proceeding thereon the petitioner shall give bond to the state in such sum as the court may order, not exceeding two thousand dollars, with not less than two sureties, who shall justify in the manner required of sureties on bail-bonds, conditioned to pay all costs, disbursements, and attorney's fees that may be awarded against him if he shall not prevail. If the petitioner prevails, he may recover his costs, disbursements, and reasonable attorney's fees against the contestee. But costs, disbursements, and attorney's fees, in all such cases, shall be in the discretion of the court, and in case judgment is rendered against the petitioner, it shall also be rendered against the sureties on the bond. On the filing of any such petition, the clerk shall immediately notify the judge of the court, and issue a citation to the person whose nomination or office is contested, citing them to appear and answer, not less than three nor more than seven days after the date of filing the petition, and the court shall hear said cause, and every such contest shall take precedence over all other business on the court docket, and shall be tried and disposed of with all convenient despatch. The court shall always be deemed in session for the trial of such cases.

History: En. Sec. 48, Init. Act, Nov. 1912; re-en. Sec. 10813, R. C. M. 1921.

Operation and Effect

Under this section and the following section, the prevailing party in an election contest, whether the petitioner or respondent, is entitled to attorney's fees in addition to his other costs and disbursements, the amount to be awarded in that behalf resting upon the sound discretion of the trial court. Doty v. Reece, 53 M 404, 407, 164 P 542.

Id. This section and the following section, awarding the successful party in an election contest attorney's fees, etc., are not open to constitutional objections that they deny to the unsuccessful one the

equal protection of the laws, grant to the former a special privilege not enjoyed by successful litigants in other cases, violate the provision that justice shall be administered without sale, denial, or delay, and constitute an attempt to delegate legislative power to the courts.

References

Cited or applied as section 48, Laws of 1913, in State ex rel. Smith v. District Court, 50 M 134, 137, 145 P 721.

Elections 280, 285 (1), 307.

29 C.J.S. Elections §§ 254-256, 259, 260, 268, 271, 319, 320, 322.

18 Am. Jur. 370, Elections, §§ 295 et seq.

94-1468. (10814) Hearing of contest. The petitioner (contestant) and the contestee may appear and produce evidence at the hearing, but no person, other than the petitioner and contestee, shall be made a party to the proceedings on such petition; and no person, other than said parties and their attorneys, shall be heard thereon, except by order of the court. If more than one petition is pending, or the election of more than one person is contested, the court may, in its discretion, order the cases to be heard together, and may apportion the costs, disbursements, and attorney's fees between them, and shall finally determine all questions of law and fact, save only that the judge may, in his discretion, impanel a jury to decide

on questions of fact. In the case of other nominations or elections, the court shall forthwith certify its decision to the board or official issuing certificates of nomination or election, which board or official shall thereupon issue certificates of nomination or election to the person or persons entitled thereto by such decision. If judgment of ouster against a defendant shall be rendered, said judgment shall award the nomination or office to the person receiving next the highest number of votes, unless it shall be further determined in the action, upon appropriate pleading and proof by the defendant, that some act has been done or committed which would have been ground in a similar action against such person, had he received the highest number of votes for such nomination or office, for a judgment of ouster against him; and if it shall be so determined at the trial, the nomination or office shall be by the judgment declared vacant, and shall thereupon be filled by a new election, or by appointment, as may be provided by law regarding vacancies in such nomination or office.

History: En. Sec. 49, Init. Act, Nov. 1912; re-en. Sec. 10814, R. C. M. 1921.

NOTE.—In the case of *State ex rel. Smith v. District Court*, 50 M 134, 145 P 721, so much of the above section as related to the certification of findings to the secretary of state in the case of contested nominations or election of senators or representatives was held unconstitutional and is omitted from this code.

Constitutionality

If this section permits a candidate who did not receive the highest number of legal votes to be declared elected upon a judgment of ouster in a contest proceed-

ing, it is void as in contravention of section 13, article IX, of the constitution. *Cadle v. Town of Baker*, 51 M 176, 185, 149 P 960.

References

Cited or applied as section 49, Laws of 1913, in *State ex rel. Smith v. District Court*, 50 M 134, 137, 145 P 721; *Doty v. Reece*, 53 M 404, 407, 164 P 542.

Elections—279, 300, 303, 307.

29 C.J.S. Elections §§ 261-265, 300, 302-305, 307.

18 Am. Jur. 374, Elections, §§ 301 et seq.

Cost or reimbursement for expenses incident to election contest. 106 ALR 928.

94-1469. (10815) Corporations—proceedings against, for violation of act. In like manner as prescribed for the contesting of an election, any corporation organized under the laws of or doing business in the state of Montana may be brought into court on the ground of deliberate, serious, and material violation of the provisions of this act. The petition shall be filed in the district court in the county where said corporation has its principal office, or where the violation of law is averred to have been committed. The court, upon conviction of such corporation, may impose a fine of not more than ten thousand dollars, or may declare a forfeiture of the charter and franchises of the corporation, if organized under the laws of this state, or if it be a foreign corporation, may enjoin said corporation from further transacting business in this state, or by both such fine and forfeiture, or by both such fine and injunction.

History: En. Sec. 50, Init. Act, Nov. 1912; re-en. Sec. 10815, R. C. M. 1921.

1913, in *Cadle v. Town of Baker*, 51 M 176, 181, 149 P 960.

References

Cited or applied as section 50, Laws of

Elections—322, 332.

29 C.J.S. Elections §§ 336, 353.

94-1470. (10816) Penalty for violations not otherwise provided for. Whoever violates any provision of this act, the punishment for which is not specially provided by law, shall on conviction thereof be punished by im-

prisonment in the county jail for not more than one year, or by a fine of not more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 51, Init. Act, Nov. 1912; re-en. Sec. 10816, R. C. M. 1921.

References

Cited or applied as section 51, Laws of 1913, in *Cadle v. Town of Baker*, 51 M 176, 181, 149 P 960.

94-1471. (10817) Advancement of cases—dismissal, when—privileges of witnesses. Proceedings under this act shall be advanced on the docket upon request of either party for speedy trial, but the court may postpone or continue such trial if the ends of justice may be thereby more effectually secured, and in case of such continuance or postponement, the court may impose costs in its discretion as a condition thereof. No petition shall be dismissed without the consent of the county attorney, unless the same shall be dismissed by the court. No person shall be excused from testifying or producing papers or documents on the ground that his testimony or the production of papers or documents will tend to criminate him; but no admission, evidence, or paper made or advanced or produced by such person shall be offered or used against him in any civil or criminal prosecution, or any evidence that is the direct result of such evidence or information that he may have so given, except in a prosecution for perjury committed in such testimony.

History: En. Sec. 52, Init. Act, Nov. 1912; re-en. Sec. 10817, R. C. M. 1921.

Criminal Law 393 (1); Elections 296; Trial 13 (2); Witnesses 297.

References

Cited or applied as section 52, Laws of 1913, in *State ex rel. Smith v. District Court*, 50 M 134, 137, 145 P 721.

22 C.J.S. Criminal Law §§ 654-656; 44 C.J.S. Insane Persons § 299.

94-1472. (10818) Form of complaint. A petition or complaint filed under the provisions of this act shall be sufficient if it is substantially in the following form:

In the District Court of the
.....Judicial District,
for the County of....., State of Montana.

A B (or A B and C D), Contestants,

vs.

E F, Contestee.

The petition of contestant (or contestants) above named alleges:

That an election was held (in the state, district, county, or city of.....), on the.....day of....., A. D. 19....., for the (nomination of a candidate for) (or election of a) (state the office).

That.....and.....were candidates at said election, and the board of canvassers has returned the said.....as being duly nominated (or elected) at said election.

That contestant A B voted (or had a right to vote, as the case may be) at said election (or claims to have had a right to be returned as the nominee or officer elected or nominated at said election, or was a candidate at said election, as the case may be), and said contestant C D (here state in like manner the right of each contestant).

And said contestant (or contestants) further allege (here state the facts and grounds on which the contestants rely).

Wherefore, your contestants pray that it may be determined by the court that said was not duly nominated (or elected), and that said election was void (or that the said A B or C D, as the case may be) was duly nominated (or elected), and for such other and further relief as to the court may seem just and legal in the premises.

Said complaint shall be verified by the affidavit of one of the petitioners in the manner required by law for the verification of complaints in civil cases.

History: En. Sec. 53, Init. Act, Nov. 1913, in State ex rel. Smith v. District Court, 50 M 134, 137, 145 P 721.
1912; re-en. Sec. 10818, R. C. M. 1921.

References

Cited or applied as section 53, Laws of

Elections 284.

29 C.J.S. Elections § 267.

94-1473. (10819) Form of statement of expenses. The statement of expenses required from candidates and others by this act shall be in substantially the following form:

State of Montana, County of....., ss.

I,, having been a candidate (or expended money) at the election for the (state) (district) (county) (city) of, on the day of, A. D. 19....., being first duly sworn, on oath do say: That I have carefully examined and read the return of my election expenses and receipts hereto attached, and to the best of my knowledge and belief that return is full, correct, and true.

And I further state on oath that, except as appears from this return, I have not, and to the best of my knowledge and belief, no person, nor any club, society, or association has on my behalf, whether authorized by me or not, made any payment, or given, promised, or offered any reward, office, employment, or position, public or private, or valuable consideration, or incurred any liability on account of or in respect of the conduct or management of the said nomination or election.

And I further state on oath that, except as specified in this return, I have not paid any money, security, or equivalent for money, nor has any money or equivalent for money, to my knowledge or belief, been paid, advanced, given, or deposited by any one to or in the hands of myself or any other person for my nomination or election, or for the purpose of paying any expenses incurred on my behalf on account or in respect of the conduct or management of the said election.

And I further state on oath that I will not, except so far as I may be permitted by law, at any future time make or be a party to the making or giving of any payment, reward, office, position, or employment, or valuable consideration, for the purpose of defraying any such expenses or obligations as herein mentioned for or on account of my nomination or election, or provide or be a party to the providing of any money, security, or equivalent for money for the purpose of defraying any such expense.

(Signature of affiant).....

Subscribed and sworn to before me by the above-named, on the day of, A. D. 19.....

Attached to said affidavit shall be a full and complete account of the receipts, contributions, and expenses of said affiant, and of his supporters of which he has knowledge, with numbered vouchers for all sums and payments for which vouchers are required as to all money expended by affiant. The affidavit and account of the treasurer of any committee or any political party or organization shall be, as nearly as may be, in the same form, and so also shall be the affidavit of any person who has received or expended money in excess of the sum of fifty dollars to aid in securing the nomination or election or defeat of any candidate, or of any political party or organization, or of any measure before the people.

History: En. Sec. 54, Init. Act, Nov. 1912; re-en. Sec. 10819, R. C. M. 1921.

94-1474. (10820) False oaths or affidavits—perjury. Any person who shall knowingly make any false oath or affidavit where an oath or affidavit is required by this law shall be deemed guilty of perjury and punished accordingly.

History: En. Sec. 55, Init. Act, Nov. 1912; re-en. Sec. 10820, R. C. M. 1921. Perjury \S 5. 48 C.J. Perjury \S 57.

CHAPTER 15

EMBEZZLEMENT AND OTHER OFFENSES BY PUBLIC OFFICERS

- Section 94-1501. Embezzlement by public officer.
 94-1502. Officers neglecting to pay over public moneys.
 94-1503. "Public moneys" defined.
 94-1504. Failure to pay over fines and forfeitures received a misdemeanor.
 94-1505. Obstructing officer in collecting revenue.
 94-1506. Refusing to give assessor list of property or giving false name.
 94-1507. Making false statement, not under oath, in reference to taxes.
 94-1508. Delivering receipts for polltaxes other than prescribed by law, or collecting polltaxes, etc., without giving the receipt prescribed by law.
 94-1509. Having blank receipts for licenses other than those prescribed by law.
 94-1510. Refusing to give name of person in employment, etc.
 94-1511. Carrying on business without license.
 94-1512. Unlawfully acting as auctioneer.
 94-1513. Officer charged with collection, etc., of revenue, refusing to permit inspection of his books.
 94-1514. Board of examiners, auditor and treasurer neglecting certain duties.
 94-1515. Having state arms, etc.
 94-1516. Selling state arms, etc.
 94-1517. Sheriff falsely representing accounts.
 94-1518. Trespass on public property.
 94-1519. Limitations on preceding section.

94-1501. (11318) Embezzlement by public officer. Every officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer or disbursement of public moneys, who either—

1. Without authority of law, appropriates the same, or any portion thereof, to his own use, or to the use of another; or

2. Loans the same, or any portion thereof, except by deposits in the manner authorized by law, or having the possession or control of any public money, makes profit out of it, or uses the same for any purpose not authorized by law; or

3. Fails to keep the same in his possession or under his control until disbursed or paid out by authority of law; or

4. Unlawfully deposits the same, or any portion thereof, in any bank, or with any banks or other person; or

5. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or

6. Fraudulently alters, falsifies, conceals, destroys, or obliterates any such account; or

7. Wilfully refuses or omits to pay over, on demand, any public moneys in his hands, upon the presentation of a draft, order, or warrant drawn upon such moneys by a competent authority; or

8. Wilfully omits to transfer the same when such transfer is required by law; or

9. Wilfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any moneys received by him under any duty imposed by law which compels him to pay over the same;

is punishable by imprisonment in the state prison not less than one nor more than ten years, and is disqualified from holding any office in this state.

History: Ap. p. Sec. 770, Pen. C. 1895; en. Sec. 1, Ch. 153, L. 1907; Sec. 8592, Rev. C. 1907; re-en. Sec. 11318, R. C. M. 1921. Cal. Pen. C. Secs. 424, 503, 504.

Cross-Reference

Indictment, sec. 94-6420.

Bill of Particulars; Evidence

Where state at defendant's request furnished a bill of particulars embracing 214 items, court did not err in permitting state examiner to testify that between the alleged dates, defendant, according to his books, collected a certain amount and accounted for a less amount, leaving the shortage charged in the information, even though in arriving at such shortage examiner resorted to ledger entries relating to accounts of several thousand water consumers, such proof not having enlarged the issues beyond the 214 items in the bill of particulars. *State v. Kurth*, 105 M 260, 263, 72 P 2d 687.

Continuous Series of Acts—Information

In embezzlement of city water rentals, information alleging that employee did on a certain day in 1931 "and from thence continuously" on divers dates to a given date two years later receive public funds aggregating a given amount which he failed to pay over to the city treasurer,

held not open to objection of stating more than one offense nor being duplicitous, under the rule that in such case there is no duplicity where the embezzlement is accomplished by a continuous series of acts, which the state might treat as constituting one embezzlement, irrespective of ordinance requiring daily accounting. *State v. Kurth*, 105 M 260, 262, 72 P 2d 687.

Operation and Effect

It is a felony for a county treasurer to keep county moneys on a general deposit in a bank without the security required by section 16-2618. *Yellowstone Co. v. First Trust & Savings Bank*, 46 M 439, 449, 128 P 596.

References

State ex rel. Rankin v. Benton State Bank, 81 M 322, 326, 263 P 689; *State ex rel. Parmenter v. District Court*, 111 M 453, 454, 110 P 2d 971.

Embezzlement—11 (2).

29 C.J.S. Embezzlement § 11.

18 Am. Jur. 595, Embezzlement, § 40. See 43 Am. Jur. 129, Public Officers, § 330.

Statute relating to offense of misappropriating or embezzling public money or property as applicable to one not in possession. 128 ALR 1373.

94-1502. (11319) **Officers neglecting to pay over public moneys.** Every officer charged with the receipt, safekeeping, or disbursement of any public moneys, who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of felony.

History: En. Sec. 771, Pen. C. 1895; re-en. Sec. 8593, Rev. C. 1907; re-en. Sec. 11319, R. C. M. 1921. Cal. Pen. C. Sec. 425.

to deprive the state of its property need not be shown. *State v. McGuire*, 107 M 341, 346, 88 P 2d 35.

References

Cited or applied as section 771, Penal Code, in *Raban v. Cascade Bank*, 33 M 413, 416, 84 P 72.

18 Am. Jur. 595, Embezzlement, § 40.

See 43 Am. Jur. 129, Public Officers, § 330.

Distinguished Between Larceny by Bailee

Where the evidence was insufficient to support a conviction under the charge of larceny by bailee under section 94-2701, which makes the appropriation and intent the necessary elements, it would have been sufficient under this section where appropriation to one's own use with the intent

94-1503. (11320) "Public moneys" defined. The phrase "public moneys," as used in this code, includes all bonds and evidences of indebtedness, and all moneys belonging to the state, or any city, county, town, or district therein, and all moneys, bonds, and evidences of indebtedness received or held by state, county, city, or town officers in their official capacity.

History: En. Sec. 772, Pen. C. 1895; re-en. Sec. 8594, Rev. C. 1907; re-en. Sec. 11320, R. C. M. 1921. Cal. Pen. C. Sec. 426.

References

State v. McGraw, 74 M 152, 158, 240 P 812.

Embezzlement 6.

29 C.J.S. Embezzlement § 6.

94-1504. (11321) Failure to pay over fines and forfeitures received a misdemeanor. If any clerk, justice of the peace, sheriff, or constable, who receives any fine or forfeiture, refuses or neglects to pay over the same according to law, and within thirty days after the receipt thereof, is guilty of a misdemeanor.

History: En. Sec. 773, Pen. C. 1895; re-en. Sec. 8595, Rev. C. 1907; re-en. Sec. 11321, R. C. M. 1921. Cal. Pen. C. Sec. 427.

94-1505. (11322) Obstructing officer in collecting revenue. Every person who wilfully obstructs or hinders any public officer from collecting any revenue, taxes, or other sums of money in which this state is interested, and which such officer is by law empowered to collect, or who obstructs or hinders any public officer in the discharge of his duty, is guilty of a misdemeanor.

History: En. Sec. 774, Pen. C. 1895; re-en. Sec. 8596, Rev. C. 1907; re-en. Sec. 11322, R. C. M. 1921. Cal. Pen. C. Sec. 428.

Obstructing Justice 7.

46 C.J. Obstructing Justice § 2 et seq.

94-1506. (11323) Refusing to give assessor list of property or giving false name. Every person who unlawfully refuses, upon demand, to give to any county assessor a list of his property subject to taxation, or to swear to such list, or who gives a false name or fraudulently refuses to give his true name to any assessor, when demanded by such assessor, in the discharge of his official duties, is guilty of a misdemeanor.

History: En. Sec. 775, Pen. C. 1895; re-en. Sec. 8597, Rev. C. 1907; re-en. Sec. 11323, R. C. M. 1921. Cal. Pen. C. Sec. 429.

Taxation 335½.

61 C.J. Taxation § 771.

94-1507. (11324) Making false statement, not under oath, in reference to taxes. Every person who, in making any statement, not upon oath, oral

or written, which is required or authorized by law to be made, as the basis of imposing any tax or assessment or of an application to reduce any tax or assessment, wilfully states anything which he knows to be false, is guilty of a misdemeanor.

History: En. Sec. 776, Pen. C. 1895;
re-en. Sec. 8598, Rev. C. 1907; re-en. Sec.
11324, R. C. M. 1921. Cal. Pen. C. Sec. 430.

94-1508. (11325) Delivering receipts for polltaxes other than prescribed by law, or collecting polltaxes, etc., without giving the receipt prescribed by law. Every person who uses or gives any receipt, except that prescribed by law, as evidence of the payment of any polltax, road tax, or license of any kind, or who receives payment of such tax or license without delivering the receipt prescribed by law, or who inserts the name of more than one person therein, is guilty of a misdemeanor.

History: En. Sec. 777, Pen. C. 1895; Taxation \hookrightarrow 528½.
re-en. Sec. 8599, Rev. C. 1907; re-en. Sec. 61 C.J. Taxation § 1249.
11325, R. C. M. 1921. Cal. Pen. C. Sec.
431.

94-1509. (11326) Having blank receipts for licenses other than those prescribed by law. Every person who has in his possession, with intent to circulate or sell, any blank licenses or polltax receipts other than those furnished by the officer authorized by law, is guilty of a felony.

History: En. Sec. 778, Pen. C. 1895; 11326, R. C. M. 1921. Cal. Pen. C. Sec.
re-en. Sec. 8600, Rev. C. 1907; re-en. Sec. 432.

94-1510. (11327) Refusing to give name of person in employment, etc. Every person who, when requested by the collector of taxes or licenses, refuses to give to such collector the name and residence of each man in his employment, or to give such collector access to the building or place where such men are employed, is guilty of a misdemeanor.

History: En. Sec. 779, Pen. C. 1895; Taxation \hookrightarrow 603.
re-en. Sec. 8601, Rev. C. 1907; re-en. Sec. 61 C.J. Taxation § 1352.
11327, R. C. M. 1921. Cal. Pen. C. Sec.
434.

94-1511. (11328) Carrying on business without license. Every person who commences or carries on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring a license prescribed by such law, is guilty of a misdemeanor.

History: En. Sec. 780, Pen. C. 1895; **Cross-Reference**
re-en. Sec. 8602, Rev. C. 1907; re-en. Sec. Prosecution for failure to procure li-
11328, R. C. M. 1921. Cal. Pen. C. Sec. cense, sec. 84-2703.
435.

Licenses \hookrightarrow 40.
37 C.J. Licenses § 151 et seq.
33 Am. Jur. 389, Licenses, §§ 75 et seq.

94-1512. (11329) Unlawfully acting as auctioneer. Every person who acts as an auctioneer in violation of the laws of this state relating to auctions and auctioneers, is guilty of a misdemeanor.

History: En. Sec. 781, Pen. C. 1895; 11329, R. C. M. 1921. Cal. Pen. C. Sec.
re-en. Sec. 8603, Rev. C. 1907; re-en. Sec. 436.

Auctions and Auctioneers⇒13.

7 C.J.S. Auctions and Auctioneers § 17.

94-1513. (11330) Officer charged with collection, etc., of revenue, refusing to permit inspection of his books. Every person charged with the collection, receipt, or disbursement of any portion of the revenue of this state, who, upon demand, fails or refuses to permit the state examiner, state auditor, or attorney general to inspect his books, papers, receipts, and records pertaining to his office, is guilty of a misdemeanor.

History: En. Sec. 782, Pen. C. 1895;
re-en. Sec. 8604, Rev. C. 1907; re-en. Sec.
11330, R. C. M. 1921. Cal. Pen. C. Sec.
440.

Taxation⇒571.

61 C.J. Taxation § 1352.

94-1514. (11331) Board of examiners, auditor and treasurer neglecting certain duties. Every member of the board of examiners, and every state auditor, or state treasurer who violates any of the provisions of the laws of this state relating to the board of examiners, or prescribing its powers and duties, is guilty of a felony.

History: En. Sec. 783, Pen. C. 1895;
re-en. Sec. 8605, Rev. C. 1907; re-en. Sec.
11331, R. C. M. 1921. Cal. Pen. C. Sec.
441.

States⇒81.

59 C.J. States § 229 et seq.

94-1515. (11332) Having state arms, etc. Every person who unlawfully retains in his possession any arms, equipments, clothing, or military stores belonging to the state, or the property of any company of the state militia, is guilty of a misdemeanor.

History: En. Sec. 784, Pen. C. 1895;
re-en. Sec. 8606, Rev. C. 1907; re-en. Sec.
11332, R. C. M. 1921.

Militia⇒13.

40 C.J. Militia § 66.

94-1516. (11333) Selling state arms, etc. Every member of the state militia who unlawfully disposes of any arms, equipments, clothing, or military stores, the property of this state, or of any company of the state militia, is guilty of a misdemeanor.

History: En. Sec. 785, Pen. C. 1895;
re-en. Sec. 8607, Rev. C. 1907; re-en. Sec.
11333, R. C. M. 1921.

94-1517. (11334) Sheriff falsely representing accounts. Every person who violates any of the provisions of sections 25-225 and 25-229, relating to sheriff, is guilty of a felony.

History: En. Sec. 786, Pen. C. 1895;
re-en. Sec. 8608, Rev. C. 1907; re-en. Sec.
11334, R. C. M. 1921.

Sheriffs and Constables⇒153.

57 C.J. Sheriffs and Constables § 1112
et seq.

94-1518. (11335) Trespass on public property. If any person shall wilfully injure or trespass or commit waste upon any premises, or shall damage, deface, or destroy any house, improvement, or other like property, such premises, house, improvement, or property being then and there the property of this state, the person or persons so offending shall be deemed guilty of a misdemeanor if the damage does not exceed fifty dollars; and of a felony if such damage exceeds fifty dollars. If convicted of a misdemeanor, in this section defined, the defendant shall be punished by a fine of not less than fifty dollars, or by imprisonment in the county jail not more than sixty days, or by both such fine and imprisonment. If con-

viicted of the felony herein defined, the person so convicted shall be punished by imprisonment at hard labor in the penitentiary not less than six months nor more than ten years, and in addition to penalties before mentioned the party convicted shall be liable to the state in the sum of three times the value of the property taken, the damage done or the property destroyed, to be recovered in a civil action.

History: En. Sec. 1, p. 45, L. 1893; re-en. Sec. 787, Pen. C. 1895; re-en. Sec. 8609, Rev. C. 1907; re-en. Sec. 11335, R. C. M. 1921.

Cross-Reference

Committing waste or trespass on state lands, sec. 94-3334.

Trespass ~~Sec.~~ 78, 79.

63 C.J. Trespass § 305 et seq.

94-1519. (11336) Limitations on preceding section. The foregoing section shall not apply to unenclosed granted lands to the state, which are not occupied and have no improvements or enclosures thereon so far as mere trespass, not malicious, is concerned, but shall apply to any waste or destruction thereon, or to the cutting or removing of timber therefrom, or the destruction of the same. All fines collected and all moneys recovered by virtue of this section must be paid into the school fund of the state.

History: En. Sec. 788, Pen. C. 1895; re-en. Sec. 8610, Rev. C. 1907; re-en. Sec. 11336, R. C. M. 1921.

CHAPTER 16

EXTORTION

- Section 94-1601. Extortion defined.
 94-1602. What threats constitute extortion.
 94-1603. Punishment of extortion in certain cases.
 94-1604. Obtaining signature by means of threats.
 94-1605. Compulsion to execute instrument.
 94-1606. Oppression committed under color of official right.
 94-1607. Extortion committed under color of official right.
 94-1608. Punishment of extortion committed under color of official right.
 94-1609. Blackmail.
 94-1610. Written threats.
 94-1611. Verbal threats.
 94-1612. Unlawful threat referring to act of third person.
 94-1613. Employee of railroad company taking more fare, etc.
 94-1614. Requiring release of liability, etc.
 94-1615. Extortion—refusal to pay wages without discount.
 94-1616. Receipt or solicitation of gifts by foremen from employees.
 94-1617. Immunity of witnesses.

94-1601. (11389) Extortion defined. Extortion is the obtaining of property from another with his consent induced by wrongful use of force or fear or under color of official right.

History: En. Sec. 910, Pen. C. 1895; re-en. Sec. 8663, Rev. C. 1907; re-en. Sec. 11389, R. C. M. 1921. Cal. Pen. C. Sec. 518.

Instruction on This Section

The giving of an instruction defining the word "extortion" in the language of the statute held not objectionable as a bare statement of a proposition of law, in an

action to recover money paid under duress, it not being error to give instructions containing abstract statements of statutory law where the facts are few and simple. *Edquest v. Tripp & Dragstedt Co. et al.*, 93 M 446, 461, 19 P 2d 637.

References

Cited or applied as section 8663, Revised Codes, in *In re Bunston*, 52 M 83, 87, 155

P 1109; *Kozasa v. Northern Pac. Ry. Co.*
et al., 61 M 233, 235, 201 P 682.

35 C.J.S. Extortion § 1.

22 Am. Jur. 234, Extortion and Black-mail, § 2.

Extortion ⇨ 1.

94-1602. (11390) What threats constitute extortion. Fear, such as will constitute extortion, may be induced by a threat either—

1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or,
2. To accuse him or any relative or member of his family of any crime; or,
3. To expose or impute to them or him any deformity or disgrace; or,
4. To expose any secret affecting him or them.

History: Ap. p. Sec. 128, p. 298, Cod. Stat. 1871; re-en. Sec. 128, 4th Div. Rev. Stat. 1879; re-en. Sec. 137, 4th Div. Comp. Stat. 1887; en. Sec. 911, Pen. C. 1895; re-en. Sec. 8664, Rev. C. 1907; re-en. Sec. 11390, R. C. M. 1921. Cal. Pen. C. Sec. 519.

Instruction on This Section

The giving of an instruction defining the word "extortion" in the language of the statute held not objectionable as a bare statement of a proposition of law, in an action to recover money paid under duress, it not being error to give instructions containing abstract statements of statutory law where the facts are few and simple. *Edquest v. Tripp & Dragstedt Co.* et al., 93 M 446, 461, 19 P 2d 637.

Operation and Effect

The right of an employee to work is not property, and therefore a complaint charging a foreman with extorting money from an employee by a threat to discharge him did not charge the crime of extortion. In *re McCabe*, 29 M 28, 30, 73 P 1106.

References

Cited or applied as section 8664, Revised Codes, in *In re Bunston*, 52 M 83, 87, 155 P 1109; *Kozasa v. Northern Pac. Ry. Co.* et al., 61 M 233, 235, 201 P 682.

Threats ⇨ 1 (1).

62 C.J. Threats and Unlawful Communications § 3 et seq.

22 Am. Jur. 239, Extortion and Black-mail, § 20.

94-1603. (11391) Punishment of extortion in certain cases. Every person who extorts money or other property from another under circumstances not amounting to robbery by means of force or any threat such as is mentioned in the preceding section is punishable by imprisonment in the state prison not exceeding five years.

History: En. Sec. 912, Pen. C. 1895; re-en. Sec. 8665, Rev. C. 1907; re-en. Sec. 11391, R. C. M. 1921. Cal. Pen. C. Sec. 520.

94-1604. (11392) Obtaining signature by means of threats. Every person who by any extortionate means obtains from another his signature to any paper or instrument whereby, if such signature were freely given, any property would be transferred or any debt, demand, charge, or right of action created is punishable in the same manner as if the actual delivery of such debt, demand, charge or right of action were obtained.

History: En. Sec. 913, Pen. C. 1895; re-en. Sec. 8666, Rev. C. 1907; re-en. Sec. 11392, R. C. M. 1921. Cal. Pen. C. Sec. 522.

94-1605. (11393) Compulsion to execute instrument. The compelling or inducing another by force or threat to make, subscribe, seal, execute, alter, or destroy any valuable security or instrument, or writing affecting or intended to affect any cause of action or defense or any property is extortion under the provisions of the three preceding sections.

History: En. Sec. 914, Pen. C. 1895; re-en. Sec. 8667, Rev. C. 1907; re-en. Sec. 11393, R. C. M. 1921.

94-1606. (11394) Oppression committed under color of official right. Every public officer or person pretending to be such who unlawfully and maliciously, under pretense or color of official authority—

1. Arrests another or detains him against his will; or,
2. Seizes or levies upon another's property; or,
3. Dispossesses another of any lands or tenements; or,
4. Does any other act whereby another person is injured in his person, property or rights, is guilty of a misdemeanor.

History: En. Sec. 915, Pen. C. 1895;
re-en. Sec. 8668, Rev. C. 1907; re-en. Sec.
11394, R. C. M. 1921.

94-1607. (11395) Extortion committed under color of official right. Every public officer who asks or receives or agrees to receive a fee or other compensation for his official services, either:

1. In excess of the fee or compensation allowed to him by statute therefor; or,
2. Where no fee or compensation is allowed to him by statute therefor; is guilty of a misdemeanor.

History: En. Sec. 916, Pen. C. 1895;
re-en. Sec. 8669, Rev. C. 1907; re-en. Sec.
11395, R. C. M. 1921.

Extortion \hookrightarrow 8.
35 C.J.S. Extortion § 6.
22 Am. Jur. 237, Extortion and Black-
mail, § 11.

94-1608. (11396) Punishment of extortion committed under color of official right. Every person who commits any extortion under color of official right, in cases for which a different punishment is not prescribed by this code, is guilty of a misdemeanor.

History: En. Sec. 917, Pen. C. 1895;
re-en. Sec. 8670, Rev. C. 1907; re-en. Sec.
11396, R. C. M. 1921. Cal. Pen. C. Sec.
521.

Extortion \hookrightarrow 18.
35 C.J.S. Extortion § 45.

94-1609. (11397) Blackmail. Every person who, knowing the contents thereof, and with intent by means thereof, to extort or gain any money or other property, or to do, abet or procure any illegal or wrongful act, sends, delivers or in any manner causes to be forwarded or received, or makes or parts with for the purpose that there may be sent or delivered, any letter or writing whether subscribed or not, threatening:

1. To accuse any person of crime; or,
2. To do any injury to any person or to any property; or,
3. To publish or connive at publishing any libel; or,
4. To expose or impute to any person any deformity or disgrace; or,
5. To expose any secret affecting any person;

is punishable by imprisonment in the state prison, not exceeding five years, or by fine not exceeding five thousand dollars, or both.

History: En. Sec. 918, Pen. C. 1895;
re-en. Sec. 8671, Rev. C. 1907; re-en. Sec.
11397, R. C. M. 1921. Cal. Pen. C. Sec.
523.

References
Cited or applied as section 8671, Revised
Codes, in In re Bunston, 52 M 83, 87, 155
P 1109.

94-1610. (11398) Written threats. Every person who, knowing the contents thereof, sends, delivers, or in any manner causes to be sent or received any letter or other writing, whether subscribed or not, threatening to

do an unlawful injury to the person or property of another, is guilty of a misdemeanor.

History: En. Sec. 919, Pen. C. 1895; 22 Am. Jur. 239, Extortion and Black-mail, §§ 20 et seq.
re-en. Sec. 8672, Rev. C. 1907; re-en. Sec. 11398, R. C. M. 1921. Words as criminal offense other than libel or slander. 48 ALR 83.

94-1611. (11399) Verbal threats. Every person who, under circumstances not amounting to robbery or an attempt at robbery, with intent to gain or extort any money or other property, verbally makes such a threat as would be criminal under either of the preceding sections of this chapter if made or communicated in writing, is guilty of a misdemeanor.

History: En. Sec. 920, Pen. C. 1895;
re-en. Sec. 8673, Rev. C. 1907; re-en. Sec. 11399, R. C. M. 1921.

94-1612. (11400) Unlawful threat referring to act of third person. It is immaterial whether a threat made as specified in this chapter is of things to be done or omitted by the offender or by any other person.

History: En. Sec. 921, Pen. C. 1895;
re-en. Sec. 8674, Rev. C. 1907; re-en. Sec. 11400, R. C. M. 1921.

94-1613. (11401) Employee of railroad company taking more fare, etc. Every officer, agent, or employee of a railroad company, who asks or receives a greater sum than is allowed by law for the carriage of passengers or freight, is guilty of a misdemeanor.

History: En. Sec. 922, Pen. C. 1895; Carriers²¹.
re-en. Sec. 8675, Rev. C. 1907; re-en. Sec. 11401, R. C. M. 1921. Cal. Pen. C. Sec. 525. 13 C.J.S. Carriers §§ 515-522, 587, 589.

94-1614. (11402) Requiring release of liability, etc. Every person, company or corporation, which requires of its servants or employees, as a condition of their employment or otherwise, any contract or agreement whereby such person, company or corporation is released or discharged from liability or responsibility on account of personal injuries received by such servants or employees, while in the service of such person, company or corporation, by reason of the negligence of such person, company or corporation, or the agents or employees thereof, is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding five thousand dollars, or both.

History: En. Sec. 923, Pen. C. 1895; **References**
re-en. Sec. 8676, Rev. C. 1907; re-en. Sec. 11402, R. C. M. 1921. Carlson v. Northern Pac. Ry. Co., 82 M 559, 568, 268 P 549.

Cross-Reference

Contracts releasing liability for negligence void, sec. 13-803.

Master and Servant¹⁰⁰ (3).
39 C.J. Master and Servant § 436.

94-1615. (11403) Extortion—refusal to pay wages without discount. Every person, company, or corporation indebted to another person for labor, or any agent of any person, copartnership, or corporation so indebted, who shall, with intent to secure from such other person a discount upon the payment of such indebtedness, wilfully refuse to pay the same, or falsely deny the same, or the amount or validity thereof, or that the same is due, is

guilty of a misdemeanor; provided, however, that nothing herein contained shall prohibit any employer from fixing regular pay days for the payment of wages or salary earned in the calendar month immediately preceding such pay days, except in cases where the employee is discharged.

History: En. Sec. 1, Ch. 144, L. 1907; Master and Servant 84.
 Sec. 8677, Rev. C. 1907; re-en. Sec. 11403, 39 C.J. Master and Servant §§ 56, 344.
 R. C. M. 1921.

94-1616. (11404) Receipt or solicitation of gifts by foremen from employees. Any superintendent, foreman, assistant, boss, or any other person or persons who shall receive or solicit, or cause to be received or solicited, any sum of money or other valuable consideration from any person for or on account of the employment or the continuing of the employment of such person, or of anyone else, or for or on account of any promise or agreement to employ or to continue to employ any such person, or any one else, shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than one thousand dollars, or undergo an imprisonment in the county jail of not more than one year, or both, at the discretion of the court.

History: En. Sec. 1, Ch. 52, L. 1907; Master and Servant 18.
 Sec. 8678, Rev. C. 1907; re-en. Sec. 11404, 39 C.J. Master and Servant § 56.
 R. C. M. 1921.

94-1617. (11405) Immunity of witnesses. No person shall be excused from attending or testifying, or producing any books, papers, documents, or any thing or things before any court or magistrate upon any investigation, proceeding, or trial for a violation of any of the provisions of this act, upon the ground, or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to convict him of a crime, or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify, or produce evidence, documentary or otherwise; and no testimony or evidence so given or produced shall be received against him in any civil or criminal proceeding, action, or investigation.

History: En. Sec. 2, Ch. 52, L. 1907; Criminal Law 42.
 Sec. 8679, Rev. C. 1907; re-en. Sec. 11405, 22 C.J.S. Criminal Law §§ 41, 46.
 R. C. M. 1921.

CHAPTER 17

FALSIFYING EVIDENCE

- Section 94-1701. Offering false evidence.
 94-1702. Deceiving a witness.
 94-1703. Preparing false evidence.
 94-1704. Destroying evidence.
 94-1705. Preventing or dissuading witness from attending.
 94-1706. Bribing witness.
 94-1707. Receiving or offering to receive bribes.

94-1701. (10891) Offering false evidence. Every person who, upon any trial, proceeding, inquiry, or investigation whatever, authorized or permitted by law, offers in evidence, as genuine or true, any book, paper, document,

or record, or other instrument in writing, knowing the same to have been forged, or fraudulently altered or antedated, is guilty of felony.

History: En. Sec. 260, Pen. C. 1895; re-en. Sec. 8245, Rev. C. 1907; re-en. Sec. 10891, R. C. M. 1921. Cal. Pen. C. Sec. 132.

Obstructing Justice § 5.

46 C.J. Obstructing Justice § 22 et seq.

94-1702. (10892) Deceiving a witness. Every person who practices any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token, or writing, to any witness, or any person about to be called as a witness, upon any trial, proceeding, inquiry, or investigation whatever, authorized by law, with intent to affect the testimony of such witness, is guilty of a misdemeanor.

History: En. Sec. 261, Pen. C. 1895; re-en. Sec. 8246, Rev. C. 1907; re-en. Sec.

10892, R. C. M. 1921. Cal. Pen. C. Sec. 133.

94-1703. (10893) Preparing false evidence. Every person guilty of preparing any false or antedated book, paper, record, instrument in writing, or other matter or thing, with intent to produce or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law, is guilty of felony.

History: En. Sec. 262, Pen. C. 1895; re-en. Sec. 8247, Rev. C. 1907; re-en. Sec.

10893, R. C. M. 1921. Cal. Pen. C. Sec. 134.

94-1704. (10894) Destroying evidence. Every person who, knowing that any book, paper, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, wilfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor.

History: En. Sec. 263, Pen. C. 1895; re-en. Sec. 8248, Rev. C. 1907; re-en. Sec. 10894, R. C. M. 1921. Cal. Pen. C. Sec. 135.

a misdemeanor in attempting to take and destroy evidence, and therefore could not be held guilty of murder in the first degree in the absence of a showing of premeditation, deliberation and malice, was properly refused as not applicable to the evidence. *State v. Reagin*, 64 M 481, 489, 210 P 86.

Operation and Effect

Where the evidence showed that defendant had planned to commit robbery by taking personal property from the custody of an officer who had seized it as stolen property, an instruction offered on the theory based on section 94-4202 and this section, that he had merely committed

References

State v. Bolton, 65 M 74, 83 et seq., 212 P 504.

94-1705. (10895) Preventing or dissuading witness from attending. Every person who wilfully prevents or dissuades any person who is or may become a witness, from attending upon any trial, proceeding, or inquiry, authorized by law, is guilty of a misdemeanor.

History: En. Sec. 264, Pen. C. 1895; re-en. Sec. 8249, Rev. C. 1907; re-en. Sec. 10895, R. C. M. 1921. Cal. Pen. C. Sec. 136.

his adversary until the trial was concluded, and thus suppressing material testimony, constituted a misdemeanor under this section. *Buntin v. Chicago, Milwaukee & St. Paul Ry. Co.*, 54 M 495, 496, 172 P 330.

Operation and Effect

The action of a party in secreting and forcibly keeping in hiding a witness of

39 Am. Jur. 504, Obstructing Justice, § 6.

94-1706. (10896) Bribing witness. Every person who gives, or offers or promises to give, to any witness, or person about to be called as a witness,

any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced, or who attempts by any other means fraudulently to introduce any person to give false or withhold true testimony, is guilty of a felony.

History: En. Sec. 265, Pen. C. 1895;
re-en. Sec. 8250, Rev. C. 1907; re-en. Sec.
10896, R. C. M. 1921. Cal. Pen. C. Sec.
137.

Bribery—1 (1).

11 C.J.S. Bribery §§ 1, 2.

8 Am. Jur. 885, Bribery.

94-1707. (10897) Receiving or offering to receive bribes. Every person who is a witness, or is about to be called as such, who receives, or offers to receive, any bribe, upon any understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial or proceeding upon which his testimony is required, is guilty of felony.

History: En. Sec. 266, Pen. C. 1895; 10897, R. C. M. 1921. Cal. Pen. C. Sec.
re-en. Sec. 8251, Rev. C. 1907; re-en. Sec. 138.

CHAPTER 18

FALSE PERSONATION AND CHEATS

- Section 94-1801. Marrying under false personation.
94-1802. Falsely personating another in other cases.
94-1803. False statement respecting financial condition.
94-1804. Receiving property in a false character.
94-1805. Obtaining money or property by false pretenses.
94-1806. Confidence games.
94-1807. Selling land twice.
94-1808. Married person selling land under false representations.
94-1809. Mock auction.
94-1810. Consignee, false statement by.
94-1811. Selling or removing mortgaged property to defraud mortgagee.
94-1812. Conditional sale or lease—removal, sale or concealment of property to defraud vendor or lessor—larceny.
94-1813. False pedigree of animals, etc.
94-1814. Selling animal with false pedigree.
94-1815. Use of false pretenses in selling mines.
94-1816. Interference with samples for assay.
94-1817. Making false samples of ore.
94-1818. False advertising defined.
94-1819. False statements regarding merchandise.
94-1820. Penalty for violation of act.
94-1821. Fakers—definition and punishment.

94-1801. (11406) Marrying under false personation. Every person who falsely personates another, and in such assumed character marries or pretends to marry, or to sustain the marriage relation towards another, with or without connivance of such other, is guilty of a felony.

History: En. Sec. 930, Pen. C. 1895;
re-en. Sec. 8680, Rev. C. 1907; re-en. Sec.
11406, R. C. M. 1921. Cal. Pen. C. Sec.
528.

See generally, 22 Am. Jur. 443, False Pretenses and Allied Criminal Frauds.

Criminal responsibility of one aiding and abetting the offense of false personation. 5 ALR 784.

Intent as affecting offense of false personation. 97 ALR 1510.

False Personation—1.

35 C.J.S. False Personation §§ 1, 2.

94-1802. (11407) Falsely personating another in other cases. Every person who falsely personates another, and in such assumed character, either—

1. Becomes bail or surety for any party in any proceeding whatever, before any court or officer authorized to take such bail or surety; or,

2. Verifies, publishes, acknowledges, or proves in the name of another person, any written instrument, with intent that the same may be recorded, delivered and used as true; or,

3. Does any other act whereby, if it were done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person; or,

4. Confesses a judgment,

is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding five thousand dollars, or both.

History: Ap. p. Sec. 97, p. 200, Bank Stat.; re-en. Sec. 109, p. 294, Cod. Stat. 1871; re-en. Sec. 109, 4th Div. Rev. Stat. 1879; re-en. Sec. 117, 4th Div. Comp. Stat. 1887; en. Sec. 931, Pen. C. 1895; re-en. Sec. 8631, Rev. C. 1907; re-en. Sec.

11407, R. C. M. 1921. Cal. Pen. C. Sec. 529.

Larceny by appropriation of property, possession of which was obtained by impersonating owner thereof. 26 ALR 389.

94-1803. (11408) False statement respecting financial condition. Any person who, either individually or in a representative capacity—

1. Shall knowingly make a false statement in writing to any person, firm or corporation engaged in banking or other business respecting his own financial condition or the financial condition of any firm or corporation with which he is connected as member, director, officer, employee or agent, for the purpose of procuring a loan, or credit in any form or an extension of credit from the person, firm or corporation to whom such false statement is made, either for his own use or for the use of the firm or corporation with which he is connected as aforesaid; or,

2. Having previously made, or having knowledge that another has previously made, a statement in writing to any person, firm or corporation engaged in banking or other business respecting his own financial condition or the financial condition of any firm or corporation with which he is connected as aforesaid, shall afterwards procure on faith of such statement from the person, firm or corporation to whom such previous statement has been made, either for his own use, or for the use of the firm or corporation with which he is so connected, a loan or credit in any form, or an extension of credit, knowing at the time of such procuring, that such previously made statement is in any material particular false, with respect to the present financial conditions of himself or of the firm or corporation with which he is so connected; or,

3. Shall deliver to any notebroker or other agent for the sale or negotiation of commercial paper any statement in writing, knowing the same to be false, respecting his own financial condition or the financial condition of any firm or corporation with which he is connected as aforesaid, for the purpose of having such statement used in the furtherance of the sale, pledge or negotiating of any note, bill, or other instrument, for the payment of money made, or endorsed or accepted, or owned in whole or in part, by him individually or by the firm or corporation with which he is so connected; or,

4. Having previously delivered, or having knowledge that another has previously delivered to any notebroker or other agent for the sale or negotiation of commercial paper, a statement in writing respecting his own financial condition, or the financial condition of any firm or corporation with which he is connected as aforesaid, shall afterwards deliver to such notebroker or other agent for the purpose of sale, pledge or negotiation on faith of such statement, any note, bill or other instrument for the payment of money made, or endorsed, or accepted, or owned in whole or in part, by himself individually or by the firm or corporation with which he is so connected, knowing at the time that such previously delivered statement is in any material particular false as to the present financial condition of himself or such firm or corporation, is punishable by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both.

History: En. Sec. 1, Ch. 96, L. 1909; re-en. Sec. 11408, R. C. M. 1921.

False Pretenses 7 (4).

35 C.J.S. False Pretenses §§ 4, 9, 10, 12-15, 19.

94-1804. (11409) Receiving property in a false character. Every person who falsely personates another, and in such assumed character receives any money or property, knowing that it is intended to be delivered to the individual so personated, with intent to convert the same to his own use, or to that of another person, or to deprive the true owner thereof, is punishable in the same manner and to the same extent as for larceny of the money or property so received.

History: Ap. p. Sec. 98, p. 201, Bannack Stat.; re-en. Sec. 110, p. 294, Cod. Stat. 1871; re-en. Sec. 110, 4th Div. Rev. Stat. 1879; re-en. Sec. 118, 4th Div. Comp. Stat. 1887; en. Sec. 932, Pen. C. 1895; re-en. Sec. 8682, Rev. C. 1907; re-en. Sec. 11409, R. C. M. 1921. Cal. Pen. C. Sec. 530.

35 C.J.S. False Pretenses §§ 4, 33.

See generally, 22 Am. Jur. 443, False Pretenses and Allied Criminal Frauds.

Criminal responsibility of one aiding and abetting the offense of false personation. 5 ALR 784.

Larceny by appropriation of property, possession of which was obtained by impersonating owner thereof. 26 ALR 389.

False Pretenses 19.

94-1805. (11410) Obtaining money or property by false pretenses. Every person who knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property, including evidence of indebtedness, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets into possession of money or property, is punishable in the same manner and to the same extent as for larceny of the money or property so obtained.

History: En. Sec. 933, Pen. C. 1895; re-en. Sec. 8683, Rev. C. 1907; amd. Sec. 1, Ch. 60, L. 1921; re-en. Sec. 11410, R. C. M. 1921. Cal. Pen. C. Sec. 532.

Information

Information need not allege the very words of the pretenses or whether they were spoken or written to conform to section 94-7219 relating to the kind and character of proof essential to a conviction.

State v. Foot, 100 M 33, 45, 48 P 2d 1113.

It is not essential that the information charging an offense under this section contain an allegation of actual ownership nor the allegation of facts showing such ownership. Lawful possession is all that is necessary. The section does not require that the money or property necessarily belong to the person defrauded and we have no authority for writing that requirement

into the statute. The information should not be required to allege more elements in charging a crime than the statute defining the crime requires. *State v. Hanks*, 116 M 399, 408, 153 P 2d 220.

Operation and Effect

The crime of attempting to obtain money by false pretense is complete whenever the false representation is made, with the requisite criminal intent, under such circumstances that, if the thing of value had been obtained, a deprivation would have been the result; the information need not allege that the person attempted to be defrauded believed the representation, nor that the fraud was completed. *State v. Phillips*, 36 M 112, 117, 92 P 299.

To convict of the crime of obtaining property by false pretenses, the prosecution must allege and prove the making by the accused to the person defrauded of one or more representations of past events or existing facts; that such person believed the representations to be true and, relying thereon, parted with money or property which was received by the accused; that the representations were false and were made knowingly and designedly with intent to defraud such person. *State v. Bratton et al.*, 56 M 563, 186 P 327.

The information charged defendant with obtaining money from a bank by false pretenses. The evidence showed that the bank had made a loan to him on his false representations that he was the owner of a large amount of property, he drawing checks on the amount of his note placed to his credit. Held, that there was no fatal variance between the allegations of the information and the evidence. *State v. Mason*, 62 M 180, 186, 188, 204 P 358.

To constitute the crime of obtaining money by false pretenses, denounced by this section, the accused must have made such representations of past events or existing facts to the injured person knowing them to be false when he made them, that the defrauded party believed them to be true and, relying thereon, parted with money or property which was received by the accused, and that the latter intended to defraud the accuser. *State v. Woolsey*, 80 M 141, 155, 259 P 826.

Evidence among other facts presented in a prosecution charging defendant with obtaining possession of a valuable horse by false pretenses while acting as the supposed agent of a fictitious buyer, causing the horse to be shipped to a neighboring state where such buyer was unknown, the transaction being based upon simulated correspondence and culminating in the giving of a check for \$260 bearing the signature of the spurious buyer unknown by the Montana bank upon which it was drawn, held sufficient to warrant a judgment of conviction. *State v. Hanks*, 116 M 399, 402, 153 P 2d 220.

References

Cited or applied as section 8683, Revised Codes, in *State v. Taylor*, 51 M 387, 153 P 275; *State v. Moran*, 56 M 94, 107, 182 P 110; *Keller v. Safeway Stores, Inc.*, 111 M 28, 34, 108 P 2d 605.

False Pretenses \S 7 (1-5).

35 C.J.S. False Pretenses \S 1 et seq.

See generally, 22 Am. Jur. 443, False Pretenses and Allied Criminal Frauds.

Telephone conversation as false pretense. 8 ALR 656.

Obtaining money for goods not intended to be delivered as false pretense. 17 ALR 199.

Presentation of and attempt to establish fraudulent claim against governmental agency. 21 ALR 180.

Nature of pretense on which prosecution for obtaining loan or renewal thereof by false pretenses may be based. 24 ALR 397.

Intent to defraud as element of offense of false pretense through means of worthless check or draft. 35 ALR 346.

Illegal or fraudulent intent of prosecuting witness or person defrauded as defense in prosecution based on false representations. 128 ALR 1520.

Criminal offense of obtaining money under false pretenses predicated upon receipt or claim of benefits under insurance policy. 135 ALR 1157.

Criminal offense of obtaining property by false pretenses predicated upon transactions incident to raising of funds for benevolent or charitable purposes. 145 ALR 302.

94-1806. (11411) Confidence games. Every person who obtains or attempts to obtain from another any money or property, by means or use of brace fâro, or any false or worthless checks, or by any other means, artifice, device, instrument or pretense, commonly called confidence games or bunco, is punishable by imprisonment in the state prison not exceeding ten years.

History: En. Sec. 934, Pen. C. 1895; re-en. Sec. 8684, Rev. C. 1907; re-en. Sec. 11411, R. C. M. 1921.

Operation and Effect

The essence of the crime of "bunco," or confidence game, is deceit and false pre-

tense of which the injured party has no suspicion, upon which he relies and upon the faith of which he parts with his property. *State v. Moran et al.*, 56 M 94, 182 P 110.

References

State v. Gateway Mortuaries, Inc., et al.,

87 M 225, 253, 287 P 156; *Keller v. Safeway Stores, Inc.*, 111 M 28, 34, 108 P 2d 605.

False Pretenses⇒16.

35 C.J.S. False Pretenses §§ 4, 32.

94-1807. (11412) Selling land twice. Every person who, after once selling, bartering or disposing of any tract of land or town lot, or after executing any bond or agreement for the sale of any land or town lot, again wilfully and with intent to defraud previous or subsequent purchasers, sells, barterers or disposes of the same tract of land or town lot, or any part thereof, or wilfully and with intent to defraud previous or subsequent purchasers, executes any bond or agreement to sell, barter or dispose of the same land or lot, or any part thereof, to any other person for a valuable consideration, is punishable by imprisonment in the state prison not less than one nor more than ten years.

History: En. Sec. 137, p. 212, *Bannack Stat.*; re-en. Sec. 162, p. 307, *Cod. Stat.* 1871; re-en. Sec. 162, 4th Div. *Rev. Stat.* 1879; re-en. Sec. 200, 4th Div. *Comp. Stat.* 1887; amd. Sec. 935, *Pen. C.* 1895; re-en. Sec. 8685, *Rev. C.* 1907; re-en. Sec. 11412, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 533.

Operation and Effect

To make out the offense denounced by this section, it must be alleged and proven: That a sale and conveyance, or an agreement therefor, have been made; that a second sale and conveyance, or an agreement therefor, have been made for a valuable consideration; and that such second sale has been knowingly made, and with a felonious intent to defraud either the first or second purchaser. In *re Weed*, 26 M 241, 248, 67 P 308.

An essential element of the right of pri-

vate property is the right to use or dispose of it in any lawful way which does not infringe the rights of others, and apparently the only statutory provision relating to the right of an owner of real property to resell it after a previous sale is this section, which prohibits resale if made with intent to defraud previous or subsequent purchasers. *Thompson v. Lincoln National Life Insurance Co.*, 114 M 521, 533, 138 P 2d 951.

False Pretenses⇒15.

35 C.J.S. False Pretenses §§ 4, 9, 10, 14, 30.

22 *Am. Jur.* False Pretenses and Allied Criminal Frauds, p. 471, §§ 51, 52; p. 487, § 79.

False statement as to matter of record as false pretense within criminal statute. 56 *ALR* 1217.

94-1808. (11413) Married person selling land under false representations. Every person who falsely represents himself or herself as competent to sell or mortgage any real estate, to the validity of which sale or mortgage the assent or concurrence of his wife or her husband is necessary, and under such representation wilfully conveys or mortgages the same, is guilty of a felony.

History: En. Sec. 936, *Pen. C.* 1895; re-en. Sec. 8686, *Rev. C.* 1907; re-en. Sec. 11413, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 534.

False Pretenses⇒7 (1).

35 C.J.S. False Pretenses §§ 1, 4, 9, 10, 12, 14, 19.

94-1809. (11414) Mock auction. Every person who obtains any money or property from another, or obtains the signature of another to any written instrument, the false making of which would be forgery, by means of any false or fraudulent sale of property or pretended property, by auction, or by any of the practices known as mock auctions, is punishable by imprisonment, in the state prison not exceeding three years, or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or

by both fine and imprisonment; and in addition thereto, forfeits any license he may hold as auctioneer, and is forever disqualified from receiving a license to act as auctioneer within this state.

History: En. Sec. 937, Pen. C. 1895; re-en. Sec. 8687, Rev. C. 1907; re-en. Sec. 11414, R. C. M. 1921. Cal. Pen. C. Sec. 535.

Auctions and Auctioneers—13.

7 C.J.S. Auctions and Auctioneers § 17.

94-1810. (11415) Consignee, false statement by. Every commission merchant, broker, agent, factor or consignee who shall wilfully and corruptly make or cause to be made to the principal or consignor of such commission merchant, agent, broker, factor or consignee a false statement concerning the price obtained for or the quality or quantity of any property consigned or entrusted to such commission merchant, agent, broker, factor or consignee for sale, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five hundred dollars or imprisonment in the county jail not exceeding six months, or both.

History: En. Sec. 938, Pen. C. 1895; re-en. Sec. 8688, Rev. C. 1907; re-en. Sec. 11415, R. C. M. 1921. Cal. Pen. C. Sec. 536.

94-1811. (11416) Selling or removing mortgaged property to defraud mortgagee. Every person who, after mortgaging any personal property, except railroad locomotives, railroad engines, rolling-stock of a railroad, steamboat machinery in actual use and vessels, removes or causes to be removed, or permits the removal of such mortgaged property from the county where it was situated at the time it was mortgaged, without the written consent of the mortgagee, with the intent to deprive the mortgagee of his claim thereto and interest therein; and every person who, after mortgaging any personal property of any kind or character whatsoever, voluntarily sells or transfers any such mortgaged property without the written consent of the mortgagee, and with the intent to defraud such mortgagee of his claim thereto and interest therein, or with the intent to defraud the purchaser thereof, of any money or thing of value, is guilty of larceny.

History: En. Sec. 939, Pen. C. 1895; amd. Sec. 1, Ch. 72, L. 1905; re-en. Sec. 8689, Rev. C. 1907; amd. Sec. 1, Ch. 7, L. 1909; re-en. Sec. 11416, R. C. M. 1921. Cal. Pen. C. Sec. 538.

Operation and Effect

To constitute the act of removing mortgaged chattels from the county, where they were at the time the mortgage was given, a crime, it was necessary under the statute then in force that the removal be made with the intent of depriving the

mortgagee of his claim thereto or interest therein. *Averill Machinery Co. v. Taylor et al.*, 70 M 70, 79, 223 P 918.

Chattel Mortgages—230.

14 C.J.S. Chattel Mortgages §§ 280, 281.

10 Am. Jur. 889, Chattel Mortgages, §§ 272, 273.

Conditional sale of personal property as creating or reserving a "lien" within criminal statute prohibiting acts tending to prevent enforcement of lien. 153 ALR 919.

94-1812. (11416.1) Conditional sale or lease—removal, sale or concealment of property to defraud vendor or lessor—larceny. Every person who, having come into possession of any personal property under a conditional sale contract or lease under the terms of which the title to said personal property remains in the vendor or lessor, except locomotives, engines, rolling stock of a railroad, steamboat machinery and vessels in actual use, and who, not having fully complied with the conditions of said contract or

lease, shall sell or dispose of such property, or any part thereof, without first obtaining the written consent of the vendor or lessor under such contract or lease, or shall remove or cause to be removed such property, or any part thereof, out of the state of Montana without first obtaining the written consent of the vendor or lessor under such contract or lease, or shall conceal such property within the state of Montana from said vendor or lessor and refuse to deliver possession thereof after default and demand for possession by said vendor or lessor, if such sale, removal or concealment be made with intent to deprive the vendor of his claim to said property or interest therein, shall be guilty of larceny, and shall be punished in the same manner and to the same extent as for larceny of property so removed, concealed or disposed of.

History: En. Sec. 1, Ch. 108, L. 1933.

Sales \Rightarrow 484.

55 C.J. Sales § 1439 et seq.

94-1813. (11417) False pedigree of animals, etc. Every person who makes, publishes, delivers or uses any false or fraudulent pedigree of any horse, cattle, sheep or other domestic animal for the purpose of increasing the value of the animal is punishable by a fine not exceeding five hundred dollars.

History: Ap. p. Sec. 80, 5th Div. Comp. re-en. Sec. 8690, Rev. C. 1907; re-en. Sec. Stat. 1887; en. Sec. 940, Pen. C. 1895; 11417, R. C. M. 1921.

94-1814. (11418) Selling animal with false pedigree. Every person who by statements or representations concerning a false or fraudulent pedigree sells to another any domestic animal and such animal is not of the breeding or pedigree as represented, is punishable by a fine not exceeding fifty dollars, and is liable to the purchaser in a civil action for double the value or price paid for the animal.

History: Ap. p. Sec. 81, 5th Div. Comp. re-en. Sec. 8691, Rev. C. 1907; re-en. Sec. Stat. 1887; re-en. Sec. 941, Pen. C. 1895; 11418, R. C. M. 1921.

94-1815. (11419) Use of false pretenses in selling mines. Every person who, with intent to cheat, wrong, or defraud, places in or upon any mine or mining-claim any ores or specimens of ores not extracted therefrom, or exhibits any ore, or certificate of assay of ore not extracted therefrom, for the purpose of selling any mine or mining-claim, or interest therein, or who obtains any money or property by any such false pretenses or artifices, is guilty of a felony.

History: En. Sec. 942, Pen. C. 1895; re-en. Sec. 8692, Rev. C. 1907; re-en. Sec. 11419, R. C. M. 1921.

94-1816. (11420) Interference with samples for assay. Every person who interferes with, or in any manner changes samples of ores or bullion produced for sampling, or changes or alters samples or packages of ores or bullion which have been purchased for assaying, or who shall change or alter any certificate of sampling or assaying, with intent to cheat, wrong, or defraud, is guilty of a felony.

History: En. Sec. 943, Pen. C. 1895; re-en. Sec. 8693, Rev. C. 1907; re-en. Sec. 11420, R. C. M. 1921.

Mines and Minerals \Rightarrow 93½.

40 C.J. Mines and Minerals § 792.

94-1817. (11421) Making false samples of ore. Every person who, with intent to cheat, wrong, or defraud, makes or publishes a false sample of ore or bullion, or who makes or publishes, or causes to be published a false assay of ore or bullion, is guilty of a felony.

History: En. Sec. 944, Pen. C. 1895;
re-en. Sec. 8694, Rev. C. 1907; re-en. Sec.
11421, R. C. M. 1921.

94-1818. (11422) False advertising defined. False advertising as used in this act shall mean any false statement regarding the quality or price of goods, wares or merchandise, in any advertisement, circular, letter, poster, handbill, display card, or other written or printed matter, by means of which such goods, wares or merchandise are offered for sale to the public.

History: En. Sec. 1, Ch. 117, L. 1915;
re-en. Sec. 11422, R. C. M. 1921.

94-1819. (11423) False statements regarding merchandise. It shall be unlawful for any person, corporation, copartnership, or association of individuals to make any false statement regarding the quality or price of goods, wares or merchandise in any advertisement, circular, letter, poster, handbill, display card, or other written or printed matter, by means of which such goods, wares or merchandise are offered for sale to the public.

History: En. Sec. 2, Ch. 117, L. 1915;
re-en. Sec. 11423, R. C. M. 1921.

94-1820. (11424) Penalty for violation of act. Any person violating any of the provisions of this act by means of false advertising, as herein defined, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 117, L. 1915; False Pretenses § 54.
re-en. Sec. 11424, R. C. M. 1921. 35 C.J.S. False Pretenses § 56.

94-1821. (11425) Fakers—definition and punishment. Any person who shall sell or attempt to sell any articles, goods, wares or merchandise of any kind upon the streets of any city or town by means of any false representations, trick, device, or lottery, or by means of any game of chance, for the purpose and with intent to obtain a greater or better price for such article or goods than their actual retail price or value upon the market, shall be deemed a faker, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than ten days nor more than fifty days.

History: En. Sec. 1, Ch. 116, L. 1915;
re-en. Sec. 11425, R. C. M. 1921.

CHAPTER 19

FALSE WEIGHTS AND MEASURES

- Section 94-1901. False weight and measure defined.
94-1902. Using false weights or measures.
94-1903. Stamping false weight, etc., on casks or packages.
94-1904. Weight by the ton or pound.

94-1901. (11428) False weight and measure defined. A false weight or measure is one which does not conform to the standard established by the laws of the United States of America.

History: En. Sec. 960, Pen. C. 1895; re-en. Sec. 8700, Rev. C. 1907; re-en. Sec. 11428, R. C. M. 1921. Cal. Pen. C. Sec. 552.

References

Cited or applied as section 960, Penal Code, in *State v. Mitchell*, 17 M 67, 74, 42 P 100.

Cross-References

Adding extraneous substance to increase weight, penalty, sec. 94-35-171.

False receipts by public weigher, sec. 16-1113.

Weights and Measures—10.

68 C.J. Weights and Measures § 17 et seq.

56 Am. Jur. 1041, Weights, Measures, and Labels, §§ 45 et seq.

94-1902. (11429) Using false weights or measures. Every person who uses any weight or measure, knowing it to be false, by which another is defrauded or otherwise injured, is guilty of a misdemeanor.

History: En. Sec. 961, Pen. C. 1895; re-en. Sec. 8701, Rev. C. 1907; re-en. Sec. 11429, R. C. M. 1921. Cal. Pen. C. Sec. 553.

Construction of statute or ordinance with respect to net weight or capacity of containers. 35 ALR 785.

94-1903. (11430) Stamping false weight, etc., on casks or packages. Every person who knowingly marks or stamps false or short weight or measure, or false tare, on any cask or package, or knowingly sells or offers for sale, any cask or package so marked, is guilty of a misdemeanor.

History: En. Sec. 962, Pen. C. 1895; re-en. Sec. 8702, Rev. C. 1907; re-en. Sec. 11430, R. C. M. 1921. Cal. Pen. C. Sec. 554.

94-1904. (11431) Weight by the ton or pound. In all sales of coal, hay and other commodities, usually sold by the ton or fractional part thereof, the seller must give to the purchaser full weight, at the rate of two thousand pounds to the ton; and in all sales of articles which are sold in commerce by avoirdupois weight, the seller must give to the purchaser full weight, at the rate of sixteen ounces to the pound; and any person violating this section is guilty of a misdemeanor.

History: En. Sec. 963, Pen. C. 1895; re-en. Sec. 8703, Rev. C. 1907; re-en. Sec. 11431, R. C. M. 1921. Cal. Pen. C. Sec. 555.

References

Cited or applied as section 963, Penal Code, in *State v. Mitchell*, 17 M 67, 74, 42 P 100.

Cross-Reference

Full weight of coal required, secs. 5-603, 84-1410.

Weights and Measures—5.

68 C.J. Weights and Measures § 6.

CHAPTER 20

FORGERY AND COUNTERFEITING

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| Section | 94-2001. Forgery of wills, conveyances, etc. |
| | 94-2002. Making false entries in records or returns. |
| | 94-2003. Forgery of public or corporate seal. |
| | 94-2004. Punishment of forgery. |
| | 94-2005. Forging telegraphic messages. |
| | 94-2006. Possessing or receiving forged or counterfeit bills or notes with intent to defraud—penalty. |
| | 94-2007. Making, passing or uttering fictitious bills, etc. |
| | 94-2008. Counterfeiting coin, bullion, etc. |
| | 94-2009. Punishment of counterfeiting. |

- 94-2010. Possessing or receiving counterfeit coin, bullion, etc.
- 94-2011. Making or possessing counterfeit dies or plates.
- 94-2012. Counterfeiting railroad tickets, etc.
- 94-2013. Restoring canceled tickets.

94-2001. (11355) Forgery of wills, conveyances, etc. Every person who, with intent to defraud another, falsely makes, alters, forges, or counterfeits any charter, letters patent, deed, lease, indenture, writing obligatory, will, testament, codicil, annuity, covenant, bankbill or note, postnote, check, draft, bill of exchange, contract, promissory note, duebill for the payment of money, receipt for money or property, passage-ticket, power-of-attorney, or any certificate of any share, right, or interest in the stock of any corporation or association, or any auditor's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money or the delivery of goods or chattels of any kind, or for the delivery of any instrument in writing or acquittance, release or receipt for money or goods, or any acquittance, release, or discharge for any debt, account, suit, action, demand, or other thing, real or personal, or any transfer or assurance of money, certificates of shares of stock, goods, chattels, or other property whatever, or any letter-of-attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien or convey any goods, chattels, lands or tenements, or other estate, real or personal, or any acceptance or indorsement of any bill of exchange, promissory note, draft, order, or assignment of any bond, writing obligatory, or promissory note for money or other property, or counterfeits or forges the seal or handwriting of another on any official certificate, or utters, publishes, or passes or attempts to pass as true and genuine any of the above-named false, altered, forged, or counterfeited matters as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person, or who, with intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of any court, or the return of any officer to any process of any court, is guilty of forgery.

History: Ap. p. Sec. 76, p. 194, *Ban-nack Stat.*; re-en. Sec. 88, p. 287, *Cod. Stat.* 1871; re-en. Sec. 88, 4th Div. Rev. Stat. 1879; re-en. Sec. 96, 4th Div. Comp. Stat. 1887; en. Sec. 840, *Pen. C.* 1895; re-en. Sec. 8629, *Rev. C.* 1907; re-en. Sec. 11355, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 470.

Cross-References

Cigarette tax stamps, forgery or counterfeiting, sec. 84-5606.

Nomination papers of candidates for election, forgery, sec. 23-935.

Trademarks, forgery, secs. 94-35-226 to 94-35-236.

Essential Elements

The essential elements of the crime of forgery are: A false making of an instrument in writing; a fraudulent intent,

and a writing which, if genuine, might apparently be of legal efficacy or the foundation of legal liability. *State v. Alexander et al.*, 73 M 329, 332, 236 P 542.

To constitute the crime of forgery there must have been a false writing, the intent to defraud, and it must appear that the instrument, if genuine, would have validity, i.e., if genuine, it would expose a particular person to legal process, apparent legal efficiency being sufficient. *Ex parte Solway*, 82 M 89, 93, 265 P 21.

Instrument Must be Legally Valid

To constitute forgery, the instrument, alleged to have been forged, must be one which, if genuine, would have legal validity; hence, if an instrument, though falsely made, shows upon its face that it has no legal validity, it cannot be made the basis of a charge of forgery. *State v.*

Evans, 15 M 539, 541, 39 P 850; In re Farrell, 36 M 254, 260, 92 P 785. See also County of Silver Bow v. Davies, 40 M 418, 425, 107 P 81, and American Bonding Co. v. State Sav. Bank, 47 M 332, 337, 133 P 367.

A juror's certificate, which did not bear the seal required by the statute, did not constitute a legal liability against the county, and, being void on its face, a charge of forgery could not be predicated upon it. In re Farrell, 36 M 254, 266, 92 P 785. See also County of Silver Bow v. Davies, 40 M 418, 425, 107 P 81, and American Bonding Co. v. State Sav. Bank, 47 M 332, 337, 133 P 367. Compare Choate v. Spencer, 13 M 127, 132, 32 P 651; Sharman v. Huot, 20 M 555, 557, 52 P 558; Kipp v. Burton, 29 M 96, 103, 74 P 85.

Sufficiency of Alteration

The changing of an order for school supplies by detaching a portion thereof so as to create, out of what was not intended as a promissory note, a negotiable instrument, is such a material alteration of the original instrument as to constitute a forgery, if done with a criminal intent. State v. Mitten, 37 M 366, 376, 96 P 926. See First National Bank v. Barrett, 52 M 359, 365, 157 P 951.

Sufficiency of Information

An information charging the forgery of an indorsement of a certificate of deposit, which was set out in full in the information and contained the words "H. D. & Co., Bankers" at the top and above the date, and was signed "H. D. & Co." and was made payable to the order of the depositor, is sufficient, although no bank is referred to in the information, and there is no allegation therein of extrinsic facts to show that "H. D. & Co." had any bank in which money was deposited. State v. Patch, 21 M 534, 536, 55 P 108.

It is necessary that the information shall set forth the particulars in which the instrument is alleged to have been altered, in order that the trial court may say, as a matter of law, whether the alteration is of such a character as to constitute the crime of forgery. State v. Mitten, 36 M 376, 382, 92 P 969.

Id. One charged with forgery in fraudulently making an instrument cannot be proved guilty by showing that he altered the same.

Where the information charging forgery in alleging criminal intent on the part of the defendant names a number of persons as having been defrauded, among them the bank upon which the check in question was drawn and which paid it, and the person to whom it was given in payment of a debt, neither one of whom could be damaged because the signature was genuine,

proof that the remaining two suffered loss was sufficient to justify a verdict of guilty; under such circumstances the allegation as to the first two may be disregarded as surplusage. State v. Daems, 97 M 486, 497, 37 P 2d 322.

What Constitutes a Sufficient Forgery

Since the acts constituting forgery as stated in this section are in the disjunctive, any one of the acts named, if done with the intent to defraud another, constitutes the crime; hence where one forges a check, with such intent, he is guilty of forgery even though he makes no attempt to publish, utter or pass it; and indorsement on a check being no part of the instrument, it is immaterial that a forged check was not indorsed. Ex parte Solway, 82 M 89, 93, 265 P 21.

What Does not Constitute

A bank in this state had in its possession travelers' checks which it held in trust for a New York bank with authority to sell them under agreement to immediately remit the price to the latter bank. An officer of the former, who had authority to do so, issued one of the checks when the bank was insolvent without requiring the purchaser to pay therefore or remitting the price. Held, that since the officer issuing the check, which the New York bank was compelled to pay, was authorized to "make" the writing by inserting the date, the amount and the name of the selling bank, and the purchaser who signed it was a real and not a fictitious person, there was no false making of the instrument and the information charging the officer with forgery was properly dismissed on general demurrer. State v. Alexander et al., 73 M 329, 332, 236 P 542.

What May Be Forged

A city warrant, regular on its face, and apparently drawn according to law on the city treasurer, signed by the mayor and countersigned by the city clerk, for the payment of moneys out of a specific fund, is a draft, and is therefore the subject of forgery under a statute making it a forgery to "falsely make, alter, forge, or counterfeit any writing obligatory, draft," etc. State v. Brett, 16 M 360, 369, 40 P 873.

When Just the Passing of a Forged Instrument May Be Forgery

To justify a conviction of one charged with uttering a note while knowing it to be forged, it is not necessary to show that the forgery in the first instance was committed by the defendant. If, knowing that the instrument was in fact a forgery, he passed it as true and genuine with a felonious intent, he is guilty of forgery.

State v. Mitten, 37 M 366, 372, 96 P 926.
See First National Bank v. Barrett, 52 M
359, 365, 157 P 951.

References

Cited or applied as section 840, Penal
Code, in State v. Newman, 34 M 434, 436,
87 P 462.

Forgery⇒7 (1-5).

37 C.J.S. Forgery § 17 et seq.
23 Am. Jur. 689, Forgery, §§ 32 et seq.
Filing affidavit of forgery against an-
cient deed. 18 ALR 908.
Filling in blanks in paper in terms other
than authorized as forgery. 87 ALR 1169.
Alteration of written instrument in or-
der to conform to actual intention as forg-
ery. 93 ALR 864.

94-2002. (11356) Making false entries in records or returns. Every person who, with intent to defraud another, makes, forges, or alters any entry in any book of records, or any instrument purporting to be any record or return specified in the preceding section, is guilty of forgery.

History: En. Sec. 841, Pen. C. 1895;
re-en. Sec. 8630, Rev. C. 1907; re-en. Sec.
11356, R. C. M. 1921. Cal. Pen. C. Sec.
471.

See generally, 23 Am. Jur. 673, Forgery.
See also 45 Am. Jur. 426, Records and Re-
cording Laws, § 13.

94-2003. (11357) Forgery of public or corporate seal. Every person who, with intent to defraud another, forges or counterfeits the seal of this state, the seal of any public officer authorized by law, the seal of any court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this state, or any other state, government, or country, or who falsely makes, forges, or counterfeits any impression purporting to be an impression of any such seal, or who has in possession any such counterfeited seal, or impression thereof, knowing it to be counterfeited, and wilfully conceals the same, is guilty of forgery.

History: Ap. p. Sec. 86, p. 197, Ban-
nack Stat.; re-en. Sec. 98, p. 290, Cod. Stat.
1871; re-en. Sec. 98, 4th Div. Rev. Stat.
1879; re-en. Sec. 106, 4th Div. Comp. Stat.

1887; en. Sec. 842, Pen. C. 1895; re-en. Sec.
8631, Rev. C. 1907; re-en. Sec. 11357,
R. C. M. 1921. Cal. Pen. C. Sec. 472.

94-2004. (11358) Punishment of forgery. Forgery is punishable by imprisonment in the state prison for not less than one nor more than fourteen years.

History: En. Sec. 843, Pen. C. 1895;
re-en. Sec. 8632, Rev. C. 1907; re-en. Sec.

11358, R. C. M. 1921. Cal. Pen. C. Sec.
473.

94-2005. (11359) Forging telegraphic messages. Every person who knowingly and wilfully sends by telegraph to any person a false or forged message, purporting to be from such telegraph office, or from any other person, or who wilfully delivers or causes to be delivered to any person any such message, falsely purporting to have been received by telegraph, or who furnishes or conspires to furnish, or causes to be furnished to any agent, operator, or employee, to be sent by telegraph or to be delivered, any such message, knowing the same to be forged or false, with intent to deceive, injure, or defraud another, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both fine and imprisonment.

History: En. Sec. 844, Pen. C. 1895;
re-en. Sec. 8633, Rev. C. 1907; re-en. Sec.
11359, R. C. M. 1921. Cal. Pen. C. Sec.
474.

Telegraphs and Telephones⇒79.
62 C.J. Telegraphs and Telephones § 145
et seq.

94-2006. (11360) Possessing or receiving forged or counterfeit bills or notes with intent to defraud—penalty. Every person who has in his possession, or receives from another person, any forged promissory note, or bankbill, or bills for the payment of money or property, with the intention to pass the same, or to permit, cause, or procure the same to be uttered or passed with the intention to defraud any person, knowing the same to be forged or counterfeited, or has or keeps in his possession any blank or unfinished note or bankbill made in the form or similitude of any promissory note or bill for payment of money or property, made to be issued by any incorporated bank or banking company, with intention to fill up or complete such blank and unfinished note or bill, or to permit or cause or procure the same to be filled up and completed, in order to utter or pass the same, or to permit or cause or procure the same to be passed, or to defraud any person, is punishable by imprisonment in the state prison for not less than one nor more than fourteen years.

History: Ap. p. Sec. 81, p. 195, Bannack Stat.; re-en. Sec. 93, p. 289, Cod. Stat. 1871; re-en. Sec. 93, 4th Div. Rev. Stat. 1879; re-en. Sec. 101, 4th Div. Comp. Stat. 1887; en. Sec. 845, Pen. C. 1895; re-en. Sec. 8634, Rev. C. 1907; re-en. Sec. 11360, R. C. M. 1921. Cal. Pen. C. Sec. 475.

Forgery⊖17.

37 C.J.S. Forgery § 38.

14 Am. Jur. 174, Counterfeiting, § 5; 23 Am. Jur. 677, Forgery, § 5.

Government's right to recover money paid on forged drafts drawn upon it. 10 ALR 1406.

Alteration of receipt, canceled check, or other voucher as forgery. 26 ALR 1058.

Effect of promise by one whose name is forged to take care of paper. 48 ALR 1368.

94-2007. (11361) Making, passing or uttering fictitious bills, etc. Every person who makes, passes, utters, or publishes with intention to defraud any other person, or who, with like intention, attempts to pass, utter, or publish any fictitious bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of some bank, corporation, copartnership, government, or individual in existence, when in fact there is no such bank, corporation, copartnership, government, or individual in existence, knowing the bill, note, check, or instrument in writing to be fictitious, is punishable by imprisonment in the state prison for not less than one nor more than fourteen years.

History: Ap. p. Sec. 82, p. 196, Bannack Stat.; re-en. Sec. 94, p. 289, Cod. Stat. 1871; re-en. Sec. 94, 4th Div. Rev. Stat. 1879; re-en. Sec. 102, 4th Div. Comp. Stat. 1887; en. Sec. 846, Pen. C. 1895; amd. Sec. 1, Ch. 32, L. 1907; re-en. Sec. 8635, Rev. C.

1907; re-en. Sec. 11361, R. C. M. 1921. Cal. Pen. C. Sec. 476.

Forgery⊖16.

37 C.J.S. Forgery § 37.

14 Am. Jur. 174, Counterfeiting, § 5; 23 Am. Jur. 677, Forgery, § 5.

94-2008. (11362) Counterfeiting coin, bullion, etc. Every person who counterfeits any of the species of gold or silver coin current in this state, or any kind of species of gold-dust, gold or silver bullion or bars, lumps, pieces, or nuggets, or who sells, passes, or gives in payment such counterfeit coin, dust, bullion, bars, lumps, pieces, or nuggets, or permits, causes, or procures the same to be sold, uttered, or passed, with intention to defraud any person, knowing the same to be counterfeited, is guilty of counterfeiting.

History: Ap. p. Sec. 77, p. 195, Bannack Stat.; re-en. Sec. 89, p. 288, Cod. Stat. 1871; re-en. Sec. 89, 4th Div. Rev. Stat. 1879; re-en. Sec. 97, 4th Div. Comp. Stat.

1887; en. Sec. 847, Pen. C. 1895; re-en. Sec. 8636, Rev. C. 1907; re-en. Sec. 11362, R. C. M. 1921. Cal. Pen. C. Sec. 477.

Counterfeiting  2.
20 C.J.S. Counterfeiting §§ 2, 5-9.

See generally, 14 Am. Jur. 173, Counterfeiting.

94-2009. (11363) Punishment of counterfeiting. Counterfeiting is punishable by imprisonment in the state prison for not less than one nor more than fourteen years.

History: En. Sec. 848, Pen. C. 1895; re-en. Sec. 8637, Rev. C. 1907; re-en. Sec. 11363, R. C. M. 1921. Cal. Pen. C. Sec. 478.

References

Cited or applied as section 848, Penal Code, in *State v. Newman*, 34 M 434, 436, 87 P 462.

94-2010. (11364) Possessing or receiving counterfeit coin, bullion, etc. Every person who has in his possession, or receives from any other person, any counterfeit gold or silver coin of the species current in this state, or any counterfeit gold-dust, gold or silver bullion or bars, lumps, pieces, or nuggets, with the intention to sell, utter, or put off, or pass the same, or permits, causes, or produces the same to be sold, uttered, or passed with intention to defraud any person, knowing the same to be counterfeit, is punishable by imprisonment in the state prison not less than one nor more than fourteen years.

History: Ap. p. Sec. 78, p. 195, *Ban-nack Stat.*; re-en. Sec. 90, p. 288, *Cod. Stat.* 1871; re-en. Sec. 90, 4th Div. Rev. Stat. 1879; re-en. Sec. 98, 4th Div. Comp. Stat.

1887; en. Sec. 849, Pen. C. 1895; re-en. Sec. 8638, Rev. C. 1907; re-en. Sec. 11364, R. C. M. 1921. Cal. Pen. C. Sec. 479.

94-2011. (11365) Making or possessing counterfeit dies or plates. Every person who makes or knowingly has in his possession any die, plate, or any apparatus, paper, metal, machine, or other thing whatever made use of in counterfeiting coin current in this state, in counterfeiting gold-dust, gold or silver bars, bullion, lumps, pieces, or nuggets, or in counterfeiting bank-notes or bills, is punishable by imprisonment in the state prison not less than one nor more than fourteen years; and all such dies, plates, apparatus, paper, metal, or machine intended for the purpose aforesaid must be destroyed.

History: Ap. p. Sec. 83, p. 196, *Ban-nack Stat.*; re-en. Sec. 95, p. 290, *Cod. Stat.* 1871; re-en. Sec. 95, 4th Div. Rev. Stat. 1879; re-en. Sec. 103, 4th Div. Comp. Stat. 1887; en. Sec. 850, Pen. C. 1895; re-en. Sec. 8639, Rev. C. 1907; re-en. Sec. 11365, R. C. M. 1921. Cal. Pen. C. Sec. 480.

as against the objection that it merely employed the words of the statute instead of specifically describing the "apparatus, paper and other things." *State v. Shannon*, 95 M 280, 284, 26 P 2d 360.

Operation and Effect

Information charging unlawful possession of apparatus, paper, etc., used for counterfeiting bank notes held sufficient

14 Am. Jur. 174, Counterfeiting, § 4. See generally, 23 Am. Jur. 673, Forgery.

Alteration of written instrument in order to conform to actual intention as forgery. 93 ALR 864.

94-2012. (11366) Counterfeiting railroad tickets, etc. Every person who counterfeits, forges, or alters any check, ticket, order, coupon, receipt for fare, or pass, issued by any railroad company, or by any lessee or manager thereof, designated to entitle the holder to ride in the cars of such company, or who utters, publishes, or puts into circulation any such counterfeit or altered ticket, check or order, coupon, receipt for fare, or pass, with intention to defraud any such railroad company, or any lessee thereof, or any other person, is punishable by imprisonment in the state prison, or in the

county jail, not exceeding one year, or by fine not exceeding one thousand dollars, or both such imprisonment and fine.

History: En. Sec. 851, Pen. C. 1895; Carriers 22; Forgery 7 (1).
 re-en. Sec. 8640, Rev. C. 1907; re-en. Sec. 13 C.J.S. Carriers §§ 526, 542, 650; 37
 11366, R. C. M. 1921. Cal. Pen. C. Sec. C.J.S. Forgery §§ 17, 18, 20, 22, 24-28,
 481. 33-36.

23 Am. Jur. 689, Forgery, § 32.

94-2013. (11367) Restoring canceled tickets. Every person who, for the purpose of restoring to its original appearance and nominal value in whole or in part, removes, conceals, fills up, or obliterates the cuts, marks, punch holes, or other evidences of cancellation, from any ticket, check, coupon, receipt for fare, or pass issued by any railroad company or any lessee or manager thereof, canceled in whole or in part, with intent to dispose of by sale or gift, or to circulate the same, or with intent to defraud the railroad company, or lessees thereof, or any other person, or who, with like intention to defraud, offers for sale, or in payment of fare on the railroad of the company, such ticket, check, order, coupon, or pass, knowing the same to have been so restored, in whole or in part, is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one thousand dollars, or both.

History: En. Sec. 852, Pen. C. 1895; 11367, R. C. M. 1921. Cal. Pen. C. Sec.
 re-en. Sec. 8641, Rev. C. 1907; re-en. Sec. 482.

CHAPTER 21

FRAUDULENT CONVEYANCES

- Section 94-2101. Fraudulent conveyances.
 94-2102. Fraudulent removal of property to prevent levy.
 94-2103. Knowingly receiving property.
 94-2104. Concealment of the effects of insolvent debtor.

94-2101. (11432) Fraudulent conveyances. Every person who is a party to any fraudulent conveyance of any lands, tenements, or hereditaments, goods or chattels or any right or interest issuing out of the same, or to any bond, suit, judgment or execution, contract or conveyance, had, made, or contrived, with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages or demands; or who, being a party as aforesaid, at any time wittingly and willingly puts in, uses, avows, maintains, justifies or defends the same, or any of them, as true and done, had or made in good faith, or upon good consideration, or aliens, assigns or sells any of the lands, tenements or hereditaments, goods, chattels or other things before mentioned, to him or them conveyed as aforesaid, or any part thereof, is guilty of a misdemeanor.

History: En. Sec. 134, p. 211, Bannack
 Stat.; re-en. Sec. 159, p. 306, Cod. Stat.
 1871; re-en. Sec. 159, 4th Div. Rev. Stat.
 1879; re-en. Sec. 197, 4th Div. Comp. Stat.
 1887; amd. Sec. 970, Pen. C. 1895; re-en.
 Sec. 8704, Rev. C. 1907; re-en. Sec. 11432,
 R. C. M. 1921. Cal. Pen. C. Sec. 531.

Cross-Reference

Fraudulent conveyances, sec. 29-101 et seq.

Fraudulent Conveyances 329.

37 C.J.S. Fraudulent Conveyances §§ 466, 469.

See generally, 24 Am. Jur. 155, Fraudulent Conveyances.

94-2102. (11433) Fraudulent removal of property to prevent levy. Every person who, with intent to defraud a creditor, or to prevent any of

his property from being made liable for the payment of any of his debts, or from being levied upon by a writ of execution or attachment, removes any of his property or secretes, assigns, conveys, or otherwise disposes of the same, is guilty of a misdemeanor.

History: Ap. p. Sec. 139, p. 212, **Ban-** Sec. 8705, Rev. C. 1907; re-en. Sec. 11433,
nack Stat.; re-en. Sec. 164, p. 307, **Cod.** R. C. M. 1921.
 Stat. 1871; re-en. Sec. 164, 4th Div. Rev.
 Stat. 1879; re-en. Sec. 202, 4th Div. Comp. 39 Am. Jur. 506, Obstructing Justice,
 Stat. 1887; en. Sec. 971, Pen. C. 1895; re-en. §§ 8 et seq.

94-2103. (11434) Knowingly receiving property. Every person who receives any property from another, knowing that the same is transferred or delivered to him in violation of or with intent to violate the last section, is guilty of a misdemeanor.

History: En. Sec. 972, Pen. C. 1895;
 re-en. Sec. 8706, Rev. C. 1907; re-en. Sec.
 11434, R. C. M. 1921.

94-2104. (11435) Concealment of the effects of insolvent debtor. Every person who makes a general assignment of his property for the payment of his debts and wilfully conceals any part of his estate or effects, or any book account or any writing relating thereto, or any debt owing him by any person, or who represents in his list of creditors any person to whom he is not indebted, or does any act contrary to the provisions of sections 18-301 to 18-330, is guilty of a misdemeanor.

History: En. Sec. 973, Pen. C. 1895; Fraud 68.
 re-en. Sec. 8707, Rev. C. 1907; re-en. Sec. 2 C.J.S. Agency § 10; 37 C.J.S. Fraud
 11435, R. C. M. 1921. § 154.

CHAPTER 22

FRAUDULENT DESTRUCTION OF INSURED PROPERTY

Section 94-2201. Repealed.

94-2202. Presenting false proofs upon policy of insurance.

94-2201. (11426) Repealed—Chapter 271, laws of 1947.

94-2202. (11427) Presenting false proofs upon policy of insurance. Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of such claim, upon any contract of insurance for the payment of any loss, or who prepares, makes, or subscribes any account, certificate of survey, affidavit, or proof of loss, or other book, paper or writing, with intent to present or use the same, or allow it to be presented or used in support of any such claim, is punishable by imprisonment in the state prison not exceeding three years, or by fine not exceeding one thousand dollars, or both.

History: En. Sec. 951, Pen. C. 1895; 11427, R. C. M. 1921. Cal. Pen. C. Sec.
 re-en. Sec. 8699, Rev. C. 1907; re-en. Sec. 549.

CHAPTER 23

FRAUDS IN MANAGEMENT OF CORPORATIONS

Section 94-2301. Fraud in publishing false statement of concern.

94-2302. Frauds in subscriptions for stock of corporations.

- 94-2303. Fraudulent issue of stock, scrip, etc.
- 94-2304. Frauds in procuring organization, etc., of corporation.
- 94-2305. Unauthorized use of name in prospectus, etc.
- 94-2306. Misconduct of directors of stock corporations.
- 94-2307. Savings bank officer overdrawing his account.
- 94-2308. Frauds in keeping accounts in books of corporation.
- 94-2309. Officer of corporation publishing false reports.
- 94-2310. Officer of corporation to permit an inspection.
- 94-2311. Officer of railroad company contracting debt in its behalf exceeding its available means.
- 94-2312. Debt contracted in violation of the last section not invalid.
- 94-2313. Director of a corporation presumed to have knowledge of its affairs.
- 94-2314. Director present at meeting, when presumed to have assented to proceedings.
- 94-2315. Director absent from meeting, when presumed to have assented to proceedings.
- 94-2316. Foreign corporations.
- 94-2317. Same.
- 94-2318. Agent of foreign corporation.
- 94-2319. Corporation not complying with laws.
- 94-2320. Agent of corporation.
- 94-2321. Director defined.
- 94-2322. Mining and oil companies—fraudulent handling of finances.
- 94-2323. Application of act.
- 94-2324. Investigation of complaints.
- 94-2325. Penalty for violations.

94-2301. (11436) Fraud in publishing false statement of concern. Any person who knowingly makes or publishes any book, prospectus, notice, report, statement, exhibit or other publication of or concerning the affairs, financial condition or property of any corporation, joint stock association, copartnership or individual, which said book, prospectus, notice, report, statement, exhibit or other publication shall contain any material statement which is wilfully and knowingly false so as to give a less or greater apparent value to the shares, bonds or property of said corporation, joint stock association, copartnership or individual, or any part of said shares, bonds or property, than said shares, bonds or property, or any part thereof, shall really and in fact possess, shall be deemed guilty of a felony, and, upon conviction thereof, shall be imprisoned for not more than ten years, or fined not more than ten thousand dollars, or shall suffer both said fine and imprisonment.

History: En. Sec. 1, Ch. 131, L. 1907;
 Sec. 8708, Rev. C. 1907; re-en. Sec. 11436,
 R. C. M. 1921.

Corporations 369.
 19 C.J.S. Corporations §§ 931, 932.

94-2302. (11437) Frauds in subscriptions for stock of corporations. Every person who signs the name of a fictitious person to any subscription for, or an agreement to take, stock in any corporation, existing or proposed, and every person who signs to any subscription or agreement the name of any person, knowing that such person has not means or does not intend in good faith to comply with all the terms thereof, or under any understanding or agreement that the terms of such subscription or agreement are not to be complied with or enforced, is guilty of a misdemeanor.

History: En. Sec. 980, Pen. C. 1895;
 re-en. Sec. 8709, Rev. C. 1907; re-en. Sec.
 11437, R. C. M. 1921. Cal. Pen. C. Sec.
 557.

Fraud 68.
 2 C.J.S. Agency § 10; 37 C.J.S. Fraud
 § 154.

94-2303. (11438) Fraudulent issue of stock, scrip, etc. Every officer, agent or other person in the service of any joint stock company or corporation formed or existing under the laws of this state, or of the United States, or of any state or territory thereof, or of any foreign government or country, who wilfully and knowingly, with intent to defraud, either—

1. Sells, pledges or issues, or causes to be sold, pledged, or issued, signs or executes, or causes to be signed or executed, with intent to sell, pledge or issue, or cause to be sold, pledged or issued, any certificate or instrument purporting to be a certificate or evidence of the ownership of any share or shares of such company or corporation, or any bond or evidence of debt, or writing purporting to be a bond or evidence of debt of such company or corporation, without being first duly authorized by such company or corporation, or contrary to the charter or laws under which said company or corporation exists, or in excess of the power of such company or corporation, or of the limit imposed by law or otherwise, upon its power to create or issue stock or evidence of debt; or,

2. Reissues, sells, pledges or disposes of, or causes to be reissued, sold, pledged or disposed of, any surrendered or canceled certificates, or other evidence of the transfer, or ownership of any such share or shares, is punishable by imprisonment in the state prison not exceeding seven years, or by fine not exceeding three thousand dollars, or both.

History: En. Sec. 981, Pen. C. 1895; re-en. Sec. 8710, Rev. C. 1907; re-en. Sec. 11438, R. C. M. 1921.

References

Cited or applied as section 981, Penal Code, in *In re Wisner*, 36 M 298, 307, 92 P 958; *State v. Letterman*, 88 M 244, 254, 292 P 717.

94-2304. (11439) Frauds in procuring organization, etc., of corporation. Every officer, agent or clerk of any corporation, or of any persons proposing to organize a corporation, or to increase the capital stock of any corporation, who knowingly exhibits any false, forged or altered book, paper, voucher, security or other instrument of evidence, to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to allow an increase of its capital, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment in the state prison not less than three nor more than ten years.

History: En. Sec. 982, Pen. C. 1895; re-en. Sec. 8711, Rev. C. 1907; re-en. Sec. 11439, R. C. M. 1921. Cal. Pen. C. Sec. 558.

94-2305. (11440) Unauthorized use of name in prospectus, etc. Every person who, without being authorized so to do, subscribes the name of another to, or inserts the name of another in, any prospectus, circular or other advertisement or announcement of any corporation or joint stock association, existing or intended to be formed, with intent to permit the same to be published, and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, member or promoter of such corporation or association, is guilty of a misdemeanor.

History: En. Sec. 983, Pen. C. 1895; re-en. Sec. 8712, Rev. C. 1907; re-en. Sec. 11440, R. C. M. 1921. Cal. Pen. C. Sec. 559.

94-2306. (11441) Misconduct of directors of stock corporations. Every director of any stock corporation who concurs in any vote or act of the

directors of such corporation or any of them, by which it is intended, either—

1. To make any dividend, except from the surplus profits arising from the business of the corporation, and in the cases and manner allowed by law; or,

2. To divide, withdraw or in any manner, except as provided by law, pay to the stockholders, or any of them, any part of the capital stock of the corporation; or,

3. To discount or receive any evidence of debt in payment of any instalment actually called in and required to be paid, or with the intent to provide the means of making such payments; or,

4. To receive or discount any note or other evidence of debt, with the intent to enable any stockholder to withdraw any part of the money paid in by him, or his stock; or,

5. To receive from any other stock corporation, in exchange for the shares, notes, bonds or other evidences of debt of their own corporation, shares of the capital stock of such other corporation, or notes, bonds, or other evidences of debt issued by such corporation,
is guilty of a misdemeanor.

History: En. Sec. 984, Pen. C. 1895; re-en. Sec. 8713, Rev. C. 1907; re-en. Sec. 11441, R. C. M. 1921. Cal. Pen. C. Sec. 560.

References

Cited or applied as section 984, Penal Code, in *In re Wisner*, 36 M 298, 307, 92 P 958.

94-2307. (11442) Savings bank officer overdrawing his account. Every officer, teller, or clerk of any savings bank, who knowingly overdraws his account with such bank, and thereby wrongfully obtains the money, note or funds of such bank, is guilty of a misdemeanor.

History: En. Sec. 985, Pen. C. 1895; re-en. Sec. 8714, Rev. C. 1907; re-en. Sec. 11442, R. C. M. 1921. Cal. Pen. C. Sec. 561.

Cross-Reference

Officer of bank overdrawing account, penalty, sec. 5-520.

Banks and Banking 60.

9 C.J.S. Banks and Banking § 643 et seq.

94-2308. (11445) Frauds in keeping accounts in books of corporation. Every officer, director or agent of any corporation or joint-stock association, who knowingly receives or possesses himself of any property of such corporation or association, otherwise than in payment of a just demand, and who, with intent to defraud, omits to make, or to cause or to direct to be made, a full and true entry thereof in the books or accounts of such corporation or association, and every director, officer, agent or member of any corporation or joint-stock association who, with intent to defraud, destroys, alters, mutilates or falsifies any of the books, papers, writings or securities belonging to such corporation or association, or makes, or concurs in making any false entries, or omits, or concurs in omitting to make any material entry in any book of accounts or other record or document kept by such corporation or association, is punishable by imprisonment in the state prison not less than three nor more than ten years, or by imprisonment in the county

jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both imprisonment and fine.

History: En. Sec. 987, Pen. C. 1895;
re-en. Sec. 8717, Rev. C. 1907; re-en. Sec.
11445, R. C. M. 1921. Cal. Pen. C. Sec. 563.

94-2309. (11446) Officer of corporation publishing false reports. Every director, officer, or agent of any corporation or joint-stock association, who knowingly concurs in making, publishing or posting any written report, exhibit, or statement of its affairs or pecuniary condition, or book or notice containing any material statement which is false, or refuses to make any book or post any notice required by law, in the manner required by law, other than such as are mentioned in this chapter, is guilty of a felony.

History: En. Sec. 988, Pen. C. 1895;
re-en. Sec. 8718, Rev. C. 1907; re-en. Sec.
11446, R. C. M. 1921. Cal. Pen. C. Sec. 564.

Operation and Effect

The capital stock of a foreign corporation may consist in whole or in part of something other than money, and the state, having failed, in a prosecution against the

cashier and manager of a foreign banking corporation for filing a false report of its affairs, to sustain the burden of proving that the capital stock of the corporation in question had not been paid in money or any other property, an order directing a verdict of acquittal was proper. *State v. Clements*, 37 M 314, 317, 96 P 498.

94-2310. (11447) Officer of corporation to permit an inspection. Every officer or agent of any corporation, having or keeping an office within this state, who has in his custody or control any book, paper, or document of such corporation, and who refuses to give to a stockholder or member of such corporation, lawfully demanding, during office hours, to inspect or take a copy of the same, or any part thereof, a reasonable opportunity so to do, is guilty of a misdemeanor.

History: En. Sec. 989, Pen. C. 1895; 11447, R. C. M. 1921. Cal. Pen. C. Sec.
re-en. Sec. 8719, Rev. C. 1907; re-en. Sec. 565.

94-2311. (11448) Officer of railroad company contracting debt in its behalf exceeding its available means. Every officer, agent, or stockholder of any railroad company, who knowingly assents to, or has any agency in contracting any debt by or on behalf of such company, unauthorized by a special law for the purpose, the amount of which debt, with other debts of the company, exceeds its available means for the payment of its debts, in its possession, under its control, and belonging to it at the time such debt is contracted, including its bona fide and available stock subscriptions, and inclusive of its real estate, is guilty of a misdemeanor.

History: En. Sec. 990, Pen. C. 1895;
re-en. Sec. 8720, Rev. C. 1907; re-en. Sec.
11448, R. C. M. 1921. Cal. Pen. C. Sec.
566.

References

Cited or applied as section 990, Penal Code, in *In re Wisner*, 36 M 298, 308, 92 P 958.

94-2312. (11449) Debt contracted in violation of the last section not invalid. The last section does not affect the validity of a debt created in violation of its provisions, as against the company.

History: En. Sec. 991, Pen. C. 1895; 11449, R. C. M. 1921. Cal. Pen. C. Sec.
re-en. Sec. 8721, Rev. C. 1907; re-en. Sec. 567.

94-2313. (11450) Director of a corporation presumed to have knowledge of its affairs. Every director of a corporation or joint-stock association is

deemed to possess such a knowledge of the affairs of his corporation as to enable him to determine whether any act, proceeding or omission of its directors is a violation of this chapter.

History: En. Sec. 992, Pen. C. 1895; re-en. Sec. 8722, Rev. C. 1907; re-en. Sec. 11450, R. C. M. 1921. Cal. Pen. C. Sec. 568.

References

Ely, Salyards & Co. v. Farmers' E. Co., 69 M 265, 271, 221 P 522.

94-2314. (11451) Director present at meeting, when presumed to have assented to proceedings. Every director of a corporation or joint-stock association who is present at a meeting of the directors at which any act, proceeding, or omission of such directors in violation of this chapter occurs, is deemed to have concurred therein unless he at the time causes or in writing requires his dissent therefrom to be entered in the minutes of the directors.

History: En. Sec. 993, Pen. C. 1895; re-en. Sec. 8723, Rev. C. 1907; re-en. Sec. 11451, R. C. M. 1921. Cal. Pen. C. Sec. 569.

94-2315. (11452) Director absent from meeting, when presumed to have assented to proceedings. Every director of a corporation or joint-stock association, although not present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of this chapter occurs, is deemed to have concurred therein if the facts constituting such violation appear on the records or proceedings of the board of directors and he remains a director of the same company for six months thereafter and does not within that time cause or in writing require his dissent from such illegality to be entered in the minutes of the directors.

History: En. Sec. 994, Pen. C. 1895; re-en. Sec. 8724, Rev. C. 1907; re-en. Sec. 11452, R. C. M. 1921. Cal. Pen. C. Sec. 570.

94-2316. (11453) Foreign corporations. It is no defense to a prosecution for a violation of the provisions of this chapter that the corporation was one created by the laws of another state, government or country, if it was one carrying on business or keeping an office therefor within this state.

History: En. Sec. 995, Pen. C. 1895; re-en. Sec. 8725, Rev. C. 1907; re-en. Sec. 11453, R. C. M. 1921. Cal. Pen. C. Sec. 571.

Corporations 678.

19 C.J.S. Corporations § 952.

94-2317. (11454) Same. Every foreign corporation doing business in this state contrary to the provisions of sections 15-1701 to 15-1708 is guilty of a misdemeanor.

History: En. Sec. 996, Pen. C. 1895; re-en. Sec. 8726, Rev. C. 1907; re-en. Sec. 11454, R. C. M. 1921.

94-2318. (11455) Agent of foreign corporation. Every person who acts as agent or in any other capacity for a foreign corporation, who has not complied with the provisions of law relating to foreign corporations, is guilty of a misdemeanor.

History: En. Sec. 997, Pen. C. 1895; re-en. Sec. 8727, Rev. C. 1907; re-en. Sec. 11455, R. C. M. 1921.

94-2319. (11456) Corporation not complying with laws. Every corporation which fails to comply with the provisions of law relating to corporations, as prescribed in the code, is guilty of a misdemeanor.

History: En. Sec. 998, Pen. C. 1895; Corporations 526.
 re-en. Sec. 8728, Rev. C. 1907; re-en. Sec. 19 C.J.S. Corporations §§ 1358-1363.
 11456, R. C. M. 1921.

94-2320. (11457) Agent of corporation. Every person who acts as an officer, agent or in any other capacity for a corporation which has not complied with the provisions of law, as prescribed in this code, is guilty of a misdemeanor.

History: En. Sec. 999, Pen. C. 1895;
 re-en. Sec. 8729, Rev. C. 1907; re-en. Sec.
 11457, R. C. M. 1921.

94-2321. (11458) Director defined. The term "director," as used in this chapter, embraces any of the persons having by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter or known by law.

History: En. Sec. 1000, Pen. C. 1895; 11458, R. C. M. 1921. Cal. Pen. C. Sec.
 re-en. Sec. 8730, Rev. C. 1907; re-en. Sec. 572.

94-2322. (11458.1) Mining and oil companies—fraudulent handling of finances. For the purposes of this act, the following acts and offenses relative to the handling of the finances of mine and oil operations within the state of Montana shall be deemed fraudulent:

(a) Failure to expend at least seventy-five per centum (75%) of all money raised from the sale of stock or securities of any other kind or character, from the public in the actual operation and development of the oil and mining property, or in the construction of treating plants, or bona fide payments on the purchase price of state property.

(b) Failure to apply net earnings from said operations, after deducting only reasonable and legitimate expenses, to either a reserve fund, distribution of dividends, liquidation of bona fide indebtedness or reasonable development of said properties.

(c) The operation of holding companies in such a manner as to deprive the stockholders of the parent company of an equitable interest in the earnings of the parent company.

History: En. Sec. 1, Ch. 199, L. 1935. Mines and Minerals 105 (1).
 40 C.J. Mines and Minerals § 824.

94-2323. (11458.2) Application of act. The provisions of this act shall apply to any person, corporation or other form of association now operating, or which shall hereafter operate a mining or oil enterprise, the finances of which are derived in whole or in part from subscription and security sales from the public, and operating within the state of Montana. Provided that the provisions of this act shall not apply to any person, firm, corporation or cooperative association holding a permit in good standing from the state investment department, or securities listed on the New York Stock Exchange, Boston Stock Exchange, the Board of Trade of the City of Chicago, the Chicago Stock Exchange or the New York Curb Exchange.

History: En. Sec. 2, Ch. 199, L. 1935.

94-2324. (11458.3) Investigation of complaints. Any stockholder or creditor of a mining or oil company as heretofore provided in this act who has bona fide reason to believe that the provisions of this act have been

violated may complain relative thereto to the attorney general of the state of Montana, the county attorney of the county in which the property is located, or the state investment commissioner, and it shall be incumbent upon the officers heretofore mentioned to make a complete investigation of the records and affairs of said corporation or corporations, and in the event that the facts disclose the violation of the provisions of this act it shall be the duty of the officer to prefer charges against the officers and directors of the corporation or corporations involved.

History: En. Sec. 3, Ch. 199, L. 1935.

94-2325. (11458.4) Penalty for violations. Any person or the officers or directors of any corporation, cooperative association or any other association of any kind or character found guilty of the violation of the provisions of this act shall be subject to imprisonment in the state prison for a term of not less than ninety (90) days or more than three (3) years or by a fine of not less than one hundred dollars (\$100.00) or more than one thousand dollars (\$1,000.00) or both such fine and imprisonment.

History: En. Sec. 4, Ch. 199, L. 1935.

Associations \hookrightarrow 27; Corporations \hookrightarrow 324,
369.
19 C.J.S. Corporations §§ 931, 932.

CHAPTER 24

GAMBLING

- Section 94-2401. Gambling games prohibited—penalty—license fees for card tables.
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 94-2426. Who deemed a principal.
 94-2427. Violation of act a misdemeanor.
 94-2428. Act, when effective.

94-2401. (11159) Gambling games prohibited—penalty—license fees for card tables. Every person who deals, or carries on, opens or causes to be

opened, or who conducts, or causes to be conducted, operates or runs, either as principal, agent, owner or employee, whether for hire, or not, any game of monte, dondo, fan-tan, tan, stud horse poker, craps, seven and a half, twenty-one, faro, roulette, pangenì or pangene, hokey-pokey, draw-poker, or the game commonly known as round-the-table poker, or any banking or percentage game, or any game commonly known as sure-thing game, or any game of chance played with cards, dice or any device whatsoever, or who runs or conducts or causes to be run or conducted, or keeps any slot machine, punch board, or other similar machine or device, or permits the same to be run or conducted for money, checks, credits, or any representative of value, or any property or thing whatsoever, or any person owning or in charge of any cigar store, drug store, or other place of business, or any place where drinks are sold or served, who permits any of the games prohibited in this section to be played, in or about such cigar store, drug store, or other place of business, or permits any slot machine, punch board, or similar device to be kept therein, or any person or persons who conduct any bucket-shop where stocks or securities of any kind are sold on margins, and every person who plays or bets at or against said prohibited games or devices, except as hereinafter provided, is guilty of a misdemeanor and shall be punishable by a fine of not less than one hundred dollars (\$100.00), nor more than one thousand dollars (\$1,000.00), and may be imprisoned for not less than three (3) months, nor more than one (1) year, or by both such fine and imprisonment; provided, however, that it shall be lawful for cigar stores, fraternal organizations, charitable organizations, drug stores and other places of business, upon the payment of a license fee therefor to the county treasurer in the sum of ten dollars (\$10.00) annually per table used or operated in such place of business, to maintain and keep for the use and pleasure of their customers and patrons, card tables and cards with which and at which such games as rummy, whist, bridge whist, black jack, euchre, pinochle, pangene or pangenì, seven-up, hearts, freeze-out, casino, solo, cribbage, five hundred, penie ante, dominos, high-five and checkers may be played for pastime and amusement by customers who are not minors, and for the maintenance of which a charge may be made, to be paid by the users by the purchase of trade checks which must be redeemable in merchandise at the going retail price of such merchandise, which is the stock in trade of such business; and that places of business may, upon the payment of a license fee therefor to the county treasurer in the sum of ten dollars (\$10.00) annually, exhibit for use and sale to all customers not minors, trade stimulators, such as pull boards and ticket boards, where each board so used returns to the owner or business not to exceed the going retail price of the goods disposed of and sold and disposed of through the use of the same, and which goods sold and disposed of through the use of the same must not be other than the goods constituting the usual stock in trade of the business using the same.

History: En. Sec. 600, Pen. C. 1895; amd. Sec. 1, p. 80, L. 1897; amd. Secs. 1, 2 and 3, pp. 166, 167, L. 1901; amd. Sec. 1, Ch. 115, L. 1907; re-en. Sec. 8416, Rev. C. 1907; amd. Sec. 1, Ch. 86, L. 1917; re-en. Sec. 11159, R. C. M. 1921; amd. Sec. 1, Ch. 153, L. 1937. Cal. Pen. C. Sec. 330.

Cross-References

Betting on elections, sec. 94-1421.
 Lotteries, secs. 94-3001 to 94-3011.

Amount of the Stakes Immaterial

This section makes no distinction as to the amount of the stakes involved; hence

it is immaterial that the stakes were merely treats or cigars. *State v. Dumphy*, 57 M 229, 187 P 897.

Construction

This section, designed to permit the playing of certain games for amusement and pastime and as business trade stimulators upon payment of a license, held not susceptible of a construction allowing use of trade checks for betting purposes in the games enumerated. *State v. Aldahl*, 106 M 390, 393, 78 P 2d 935.

Disposal of Money Found in Slot-Machines

From the fact that the Anti-gambling Law (this section through section 94-2428), while providing for the seizure and destruction of apparatus used for gaming (sections 94-2410, 94-2411), does not authorize seizure of money contained in slot-machines and not found by the officer seizing them until they were about to be destroyed by order of court, it does not follow, in an action for its conversion by the operator of the machines, that the taking was unlawful or that plaintiff was entitled to its return. *Dorrell v. Clark et al.*, 90 M 585, 593, 4 P 2d 712.

Id. The power of courts, whether at law or in equity, may not be invoked by a violator of the law to aid him in securing the fruits of his unlawful acts; hence an operator of slot-machines seized under authority of law may not maintain an action to recover money found in them upon their destruction and ordered by the court to be placed in the custody of the clerk of court. (Mr. Justice Angstman dissenting.)

Not Permissible to Play for Trade Checks Redeemable in Cash or Merchandise

The operator of a cigar store and beer parlor who permitted the game of blackjack to be played therein with trade checks ranging in price from five cents to five dollars, sold by him to the players and which were redeemable, at the option of the holder, either in merchandise or cash, held properly found guilty of violating this section. *State v. Aldahl*, 106 M 390, 393, 78 P 2d 935.

"Pinball" Machine Played for Trade Checks, Hickeys, etc., Held Gambling Device—Building Where Used a Nuisance

Held, that a "pinball" machine, equipped with a sloping plane studded with pins and containing holes into which a small ball, catapulted by means of a spring, must fall to enable the player to win and which pays off in trade checks, is a gambling device under the provisions of this section, and while the evidence shows that by long practice a certain amount of

skill may be developed, with the patronizing public it is purely a game of chance, and the building in which it is used is a nuisance under section 94-1002. *State ex rel. Dussault v. Kilburn*, 111 M 400, 403, 109 P 2d 1108.

Slot-Machines

A so-called mint vending machine which by the insertion of a nickel and pulling a lever will bring the operator a package of mint of the value of five cents, and which may or may not in addition bring to him trade checks good for five cents in trade (and which also may be operated by the insertion of a trade check, in which event trade checks but not mint may or may not be paid), is a gambling device; the machine appeals to the operator's propensities to gamble and lures him into continuing his play in the hope that he may gain an amount much greater than the amount risked. *Marvin v. Sloan et al.*, 77 M 174, 178, 250 P 443.

Sufficiency of the Information

An information charging a violation of the anti-gambling law in the words of this section was sufficient, and it was not necessary to describe the game in detail, or set out the means by which it was carried on. *State v. Ross*, 38 M 319, 325, 99 P 1056.

An information charging defendant with permitting a game of chance to be played upon his premises is not defective because of its failure to set forth the names of the persons permitted to play. *State v. Radmilovich*, 40 M 93, 98, 105 P 91.

The particular name of a game of chance played with cards for money, checks, etc., need not be stated in the information. *State v. Duncan*, 40 M 531, 535, 107 P 510.

The allegation that the defendant did carry on, conduct, and cause to be conducted the game described is sufficient to charge an offense without regard to the expression "as owner and proprietor thereof," which may be regarded as surplusage. *State v. Tudor*, 47 M 185, 131 P 632.

When Innocent Game Becomes Gambling Device

An innocent game involving the element of skill alone becomes a gambling device when players bet on the outcome. *State ex rel. Dussault v. Kilburn*, 111 M 400, 406, 109 P 2d 1108.

References

Cited or applied as section 600, Penal Code, before amendment, in *State v. Mitchell*, 17 M 67, 71, 42 P 100; as Laws of 1901, p. 166, before amendment, in *State v. Townner*, 26 M 339, 344, 67 P 1104; as section 8416, Revised Codes, be-

fore amendment, in *State ex rel. Little v. District Court*, 49 M 158, 161, 141 P 151.

Cited or applied as section 1, Laws of 1901, before amendment, in *State v. Woodman*, 26 M 348, 352, 67 P 1118; *State v. Gateway Mortuaries, Inc., et al.*, 87 M 225, 253, 287 P 156; *State v. Hovland*, — M —, 169 P 2d 341, 344.

Gaming—68 (1-4); Licenses—15 (1).
38 C.J.S. Gaming §§ 1, 86, 87.

24 Am. Jur. Gaming and Prize Contests, p. 406, §§ 12 et seq.; p. 419, §§ 31 et seq.

Gambling as vagrancy, 14 ALR 1491.

Connection with place where gaming is carried on which will render one guilty as keeper thereof. 15 ALR 1202.

Slot vending machine as gambling device. 38 ALR 73.

Racing as a game within statute. 45 ALR 993.

What are games of chance, games of skill, and mixed games of chance and skill. 135 ALR 104.

✓ **94-2402. Licenses—application—expiration.** The license fee provided for in the preceding section shall be paid to the treasurer of the county in which such licensee operates before any of the acts or things herein licensed and permitted shall be done, operated, or used, and the applicant for a license shall, along with the amount of the license fee, send or give to the county treasurer the name and location of the business for which the license is sought, together with the names of all of the owners thereof, whereupon the county treasurer shall issue a license to said place of business, which license shall show on the face thereof, the number of card tables for which license is paid, and the trade stimulators, if any, for the use of which license is paid. All licenses issued hereunder shall expire each and every year at midnight, the 31st day of December, of the calendar year for which they are issued. The funds so received shall be deposited in the poor fund of the county.

History: En. Sec. 2, Ch. 153, L. 1937.

Licenses—22, 32 (1), 33.
37 C.J. Licenses § 98.

94-2403. Organizations excluded from act. Any religious, fraternal or charitable organization, and all private homes are not included within the provisions of this act.

History: En. Sec. 3, Ch. 153, L. 1937.

Where Evidence That Club Connected with Fraternal Organization Insufficient

Evidence in an action to abate a gambling nuisance under section 94-1002, conducted by a club claiming immunity from prosecution for allowing gambling on the premises occupied by it, on the alleged ground that it was connected with a fraternal organization or a dramatic branch thereof, held insufficient to show such connection, it on the other hand showing that there was no regularity of membership and that anyone whom the doorkeeper, one of the defendants, felt like admitting could enter and participate in the game of "keno" being played on the premises. *State ex rel. Leahy v. O'Rourke*, 115 M 502, 504, 146 P 2d 168.

Where Fraternal Organization Scheme Mere Subterfuge

In an action to abate a gambling nuisance conducted in the club rooms of a fraternal organization wherein exemption

was claimed from the operation of the gambling laws under this section, evidence held sufficient to justify the finding that the entire scheme of operations was a mere subterfuge, and that the gambling was not limited to nor for the amusement of bona fide members, but was operated as a business; the question in abatement being whether a duly organized fraternal organization is permitting practices in its club rooms in violation of the gambling laws as distinguished from a quo warranto attack upon corporate status. *State ex rel. Bottomly v. Johnson*, 116 M 483, 485, 154 P 2d 262.

The enumerated exclusions do not exclude an individual who shares in the profits and who operates as he pleases, not in conformity with the by-laws of the organization and without regard to the rights of the governing body of such excluded body. *State v. Hovland*, — M —, 169 P 2d 341, 343.

Gaming—79 (1).
38 C.J.S. Gaming §§ 83, 99, 101.

94-2404. (11160) Possession of gambling implements prohibited. Any person who has in his possession, or under his control, or who permits to be placed, maintained or kept in any room, space, enclosure or building, owned, leased or occupied by him, or under his management or control, any faro box, faro lay-out, roulette-wheel, roulette-table, crap-table, slot-machine, or any machine or apparatus of the kind mentioned in the preceding section of this act, is punishable by a fine of not less than one hundred nor more than one thousand dollars, and may be imprisoned for not less than three months nor more than one year in the discretion of the court; provided, however, that this section shall not apply to a public officer, or to a person coming into possession thereof in or by reason of the performance of an official duty and holding the same to be disposed of according to law.

History: En. Sec. 2, Ch. 115, L. 1907; re-en. Sec. 8417, Rev. C. 1907; re-en. Sec. 11160, R. C. M. 1921.

P 957; Marvin v. Sloan et al., 77 M 174, 178, 250 P 443; Dorrell v. Clark et al., 90 M 585, 593, 4 P 2d 712.

References

Cited or applied as section 8417, Revised Codes, in State v. Williams, 52 M 369, 157

Gaming 74 (1-7).

38 C.J.S. Gaming §§ 1, 86, 96-98, 102, 106.

94-2405. (11161) Obtaining money by means of gambling games or tricks deemed to be larceny. Every person who, by means of any game, device, sleight-of-hand trick, or other means whatever, by the use of cards or other implements other than those mentioned in the following section hereof, or while betting on sides, or hands, of any such game or play, fraudulently obtains from another person money or property of any description, shall be deemed guilty of larceny of property of like value.

History: En. Sec. 3, Ch. 115, L. 1907; re-en. Sec. 8418, Rev. C. 1907; re-en. Sec. 11161, R. C. M. 1921. Cal. Pen. C. Sec. 332.

Larceny 14 (1).

36 C.J. Larceny § 57.

94-2406. (11162) Brace and bunco games prohibited. Every person who uses or deals with or wins any money or property by the use of brace-faro, or of any two-card faro-box, or any brace roulette-wheel or roulette-table, or any brace apparatus, or with loaded dice or with marked cards, or by any game commonly known as a confidence game or bunco, is punishable by imprisonment in the state prison not exceeding five years.

History: En. Sec. 4, Ch. 115, L. 1907; re-en. Sec. 8419, Rev. C. 1907; re-en. Sec. 11162, R. C. M. 1921.

False Pretenses 17; Gaming 68 (1, 2).

35 C.J.S. False Pretenses § 48; 38 C.J.S. Gaming §§ 1, 3, 4.

94-2407. (11163) Soliciting or persuading persons to visit gambling resorts prohibited. Any person who persuades or solicits another to visit any room, tent, apartment or place used, or represented by the person soliciting or persuading to be a place used for the purpose of running any of the games prohibited by this act, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or imprisonment not less than three months nor more than one year, or by both such fine and imprisonment in the county jail.

History: En. Sec. 5, Ch. 115, L. 1907;
re-en. Sec. 8420, Rev. C. 1907; re-en. Sec.
11163, R. C. M. 1921. Cal. Pen. C. Sec. 318.

Cross-Reference

Enticing to gambling place, sec. 94-3610.

Gaming⇒77.

38 C.J.S. Gaming §§ 1, 107.

94-2408. (11164) Penalty for second offense. Every person who, having been convicted of a violation of any of the provisions of this act, which is punishable by fine, commits another such violation after such conviction, is punishable by a fine of not less than five hundred nor more than one thousand dollars, and by imprisonment in the county jail for not less than six months nor more than one year.

History: En. Sec. 6, Ch. 115, L. 1907;
re-en. Sec. 8421, Rev. C. 1907; re-en. Sec.
11164, R. C. M. 1921.

Criminal Law⇒1211.

24 C.J.S. Criminal Law § 1973.

94-2409. (11165) Maintaining gambling apparatus a nuisance. Any article, machine or apparatus maintained or kept in violation of any of the provisions of this act is a public nuisance, but the punishment for the maintaining or keeping of the same shall be as provided in this act.

History: En. Sec. 7, Ch. 115, L. 1907;
re-en. Sec. 8422, Rev. C. 1907; re-en. Sec.
11165, R. C. M. 1921.

Nuisance⇒61.

46 C.J. Nuisance §§ 183, 184.

94-2410. (11166) Duty of public officer to seize gambling implements and apparatus. It shall be the duty of every officer authorized to make arrests, to seize every machine, apparatus, or instrument answering to the description contained in this act, or which may be used for the carrying on or conducting of any game or games mentioned in this act, and to arrest the person actually or apparently in possession or control thereof, or of the premises in which the same may be found, if any such person be present at the time of the seizure and to bring the machine, apparatus, or instrument and the prisoner, if there be one, before a committing magistrate.

History: En. Sec. 8, Ch. 115, L. 1907;
re-en. Sec. 8423, Rev. C. 1907; re-en. Sec.
11166, R. C. M. 1921.

Gaming⇒58.

38 C.J.S. Gaming § 78.

References

Dorrell v. Clark et al., 90 M 585, 587,
4 P 2d 712.

94-2411. (11167) Duty of magistrate to retain gambling implement or apparatus for trial. The magistrate before whom any machine, apparatus, or instrument is brought pursuant to the preceding section must, if there be a prisoner and if he shall hold such prisoner, cause the machine, apparatus, or instrument to be delivered to the county attorney to be used as evidence on the trial of such prisoner. If there be no prisoner, or if the magistrate does not hold the prisoner, he must cause the immediate and public destruction of the machine, apparatus, or instrument in the presence of said magistrate. No person owning or claiming to own any such machine, apparatus, or instrument so destroyed, shall have any right of action against any person or against the state, county, or city for the value of such article, or for damages. It shall be the duty of the county attorney to produce such articles in court on the trial of the case. It shall be the duty of the trial court, after the disposition of the case, and whether the

defendant be convicted, acquitted, or fails to appear for trial, to cause the immediate and public destruction of any such article by the sheriff or any other officer or person designated by the court.

History: En. Sec. 9, Ch. 115, L. 1907; re-en. Sec. 8424, Rev. C. 1907; re-en. Sec. 11167, R. C. M. 1921.

References

Dorrell v. Clark et al., 90 M 585, 587, 4 P 2d 712.

Gaming⌘61.

38 C.J.S. Gaming § 79.

94-2412. (11167.1) Disposal of moneys confiscated by reason of violation of gambling laws. All moneys seized or taken by any peace officer and confiscated by order of any court, by reason of a violation of the gambling laws of the state of Montana, shall be deposited with the county treasurer of the county in which such seizure and confiscation was made, and shall be credited to the poor fund of the county.

History: En. Sec. 1, Ch. 25, L. 1933.

Rights and remedies in respect of money in gambling machine or other receptacle, used in connection with gambling, seized by public authorities. 79 ALR 1007.

24 Am. Jur. 436, Gaming and Prize Contests, §§ 56 et seq.

Jury trial in case of seizure of gaming devices. 17 ALR 573.

Constitutionality of statute providing for destruction of gambling devices. 81 ALR 730.

94-2413. (11168) Authority to break and enter buildings where games are probably being played. Every sheriff, constable and public officer having probable cause to believe that any room, tent, or apartment is being used as a room, tent, or apartment for the playing or conducting of any of the games mentioned in this act, shall have authority to break open any door, or opening into any such room, tent, or apartment, with or without a warrant of arrest, for the purpose of arresting the offenders against this act.

History: En. Sec. 10, Ch. 115, L. 1907; re-en. Sec. 8425, Rev. C. 1907; re-en. Sec. 11168, R. C. M. 1921.

Gaming⌘60.

38 C.J.S. Gaming § 78.

94-2414. (11169) Duty of public officer to make complaint. Every county attorney, sheriff, constable, chief of police, marshal, or police officer must inform against and make complaint and diligently prosecute persons whom they know, or concerning whom they may be informed, or whom they may have reasonable cause to believe to be offenders against the provisions of this act. The neglect or refusal of any such officer to make complaint against or diligently prosecute persons he has reasonable cause to believe to be offenders against the provisions of this act shall be deemed sufficient cause for removal from office.

History: En. Sec. 11, Ch. 115, L. 1907; re-en. Sec. 8426, Rev. C. 1907; re-en. Sec. 11169, R. C. M. 1921.

District and Prosecuting Attorneys⌘8; Municipal Corporations⌘182, 183 (5); Sheriffs and Constables⌘86.

References

Cited or applied as section 8426, Revised Codes, in State ex rel. Quintin v. Edwards, 38 M 250, 265, 99 P 940.

27 C.J.S. District and Prosecuting Attorneys §§ 10, 14; 43 C.J. Municipal Corporations §§ 1293, 1310, 1335; 57 C.J. Sheriffs and Constables § 135.

94-2415. (11170) Duty of mayors to enforce law. It shall be the duty of every mayor of every town or city in this state to cause this act to be diligently enforced and to cause the police officers of his city or town to

arrest and to make complaint against any and all persons whom he or they know, or have reasonable cause to believe to be offenders against any of the provisions of this act.

History: En. Sec. 12, Ch. 115, L. 1907;
re-en. Sec. 8427, Rev. C. 1907; re-en. Sec.
11170, R. C. M. 1921.

Municipal Corporations 168.
43 C.J. Municipal Corporations § 1193
et seq.

94-2416. (11171) Officers neglecting duty subject to forfeiture of office.

Every county attorney, sheriff, mayor, constable, chief of police, marshal, or police officer who shall refuse or neglect to perform any of the duties imposed upon him by any of the provisions of this act, shall be guilty of a misdemeanor and be punishable by a fine of not less than one hundred nor more than three thousand dollars, or imprisonment for not less than six months nor more than one year in the county jail. A conviction under this section shall, unless set aside, also work a forfeiture of the office of such officer and operate as a removal from office. But a prosecution under this section shall not bar or interfere with any proceeding or action for removal from office which may be brought under any other provision of law or statute, nor affect or limit the effect or operation of any other statute regarding removals or suspensions from office.

History: En. Sec. 13, Ch. 115, L. 1907;
re-en. Sec. 8428, Rev. C. 1907; re-en. Sec.
11171, R. C. M. 1921.

District and Prosecuting Attorneys 2
(5), 11; Municipal Corporations 156, 182,
183 (3, 5); Sheriffs and Constables 6, 13,
153.

References

Cited or applied as section 8428, Revised
Codes, in State ex rel. Quintin v. Edwards,
38 M 250, 265, 99 P 940.

27 C.J.S. District and Prosecuting At-
torneys §§ 6, 7, 9, 17; 43 C.J. Municipal
Corporations §§ 1084, 1289, 1304, 1346 et
seq.; 57 C.J. Sheriffs and Constables §§ 31
et seq., 80 et seq., 1112.

94-2417. (11172) Receiving money to protect offenders prohibited.

Every state, county, city, or township officer, or other person, who shall ask for, receive, or collect any money or valuable consideration, either for his own or for the public use, or the use of any other person or persons, for and with the understanding that he will protect or exempt any person from arrest or conviction for any violation of the provisions of this act, or that he will abstain from arresting or prosecuting, or causing to be arrested or prosecuted, any person offending against any of the provisions of this act, or that he will permit any of the things prohibited by this act to be done or carried on, and every such state, county, city, or township officer who shall grant, issue, or deliver, or cause to be issued or delivered to any person or persons, any license, permit, or other privilege giving or pretending to give any authority or right to any person or persons to carry on, conduct, open, or cause to be conducted or opened or carried on, any game or games which are forbidden by any of the provisions of this act, is guilty of a felony.

History: En. Sec. 14, Ch. 115, L. 1907;
re-en. Sec. 8429, Rev. C. 1907; re-en. Sec.
11172, R. C. M. 1921. Cal. Pen. C. Sec. 337.

Compounding Offenses 2.

15 C.J.S. Compounding Offenses § 4.

94-2418. (11173) Losses at gambling may be recovered in civil action.

If any person, by playing or betting at any of the games prohibited by this act, loses to another person any sum of money, or thing of value, and pays or delivers the same, or any part thereof, to any person connected with the operating or conducting of such game, either as owner, or dealer, or opera-

tor, the person who so loses and pays or delivers may, at any time within sixty days next after the said loss and payment or delivery, sue for and recover the money or thing of value so lost and paid or delivered, or any part thereof from any person having any interest, direct or contingent, in the game, as owner, backer, or otherwise, with costs of suit, by civil action before any court of competent jurisdiction, together with exemplary damages, which in no case shall be less than fifty nor more than five hundred dollars, and may join as defendants in said suit, all persons having any interest, direct or contingent, in such game as backers, owners, or otherwise.

History: En. Sec. 15, Ch. 115, L. 1907; re-en. Sec. 8430, Rev. C. 1907; re-en. Sec. 11173, R. C. M. 1921.

Operation and Effect

The anti-gambling law was not rendered invalid by the insertion of this section, creating a right of action in favor of one losing at any of the prohibited games, to recover the amount lost, together with exemplary damages. The right thus given is in the nature of a penalty and constitutes a part of the penalty provided by the act. *State v. Ross*, 38 M 319, 324, 99 P 1056.

Under this case, held, that the complaint in an action to recover the amount of two dollars lost by plaintiff as an alleged bet on a horse-race, with exemplary damages, under this section, alleging in substance that defendant Fair Association had given notice that it would conduct horse-racing for purses, at which any owner or co-owner of a horse competing in the races would be required to pay an entrance fee

of two dollars and that no person other than such owner or co-owners would be permitted to pay an entrance fee; that plaintiff representing himself to be a co-owner of a certain horse paid the required fee for that horse in a race to be run; that the horse did not win; that the purse plus an amount equal to the entrance fees for that horse was paid to the owners or co-owners of the winning horse; that the purse was made up of funds belonging to the association and that the association did not have any interest in the outcome of the race, etc., did not state a cause of action and that a demurrer thereto was properly sustained. *Toomey v. Penwell et al.*, 76 M 166, 170, 245 P 943.

References

Dorrell v. Clark et al., 90 M 585, 587 et seq., 4 P 2d 712.

Gaming—41, 46 (2).

38 C.J.S. Gaming §§ 46, 48, 54.

94-2419. (11174) Action may be brought by any dependent person. If any person losing such money or thing of value does not, within sixty days, without collusion or deceit, sue and with effect prosecute for the money or thing of value so lost and paid or delivered, any person, or a guardian of any person, dependent in any degree for support upon or entitled to the earnings of such persons losing said money or thing of value, or any citizen for the use of the person so dependent, may, within one year, sue for and recover the same, with costs of suit and exemplary damages as aforesaid, against any and all persons having any interest, direct or contingent, in the said game as backers, owners, or otherwise, as aforesaid.

History: En. Sec. 16, Ch. 115, L. 1907; re-en. Sec. 8431, Rev. C. 1907; re-en. Sec. 11174, R. C. M. 1921.

Gaming—26 (4).

38 C.J.S. Gaming §§ 1, 35, 36, 38.

94-2420. (11175) Pleadings in actions to recover moneys lost. In the prosecutions of such actions it shall be sufficient for the complaint to allege that the defendant is indebted to the plaintiff's use, the money or thing of value so lost and paid or delivered, whereby the plaintiff's action accrued to him, or to the person for whose use the suit is brought, without setting forth the special matter. In case suit is brought by a plaintiff for the use of

another person, that fact and the name of the person for whose use the suit is brought shall be stated.

History: En. Sec. 17, Ch. 115, L. 1907; Gaming⊖48 (1).
re-en. Sec. 8432, Rev. C. 1907; re-en. Sec. 38 C.J.S. Gaming § 56.
11175, R. C. M. 1921.

94-2421. (11176) Compelling testimony in such actions. Every person liable in a civil action under this act may be compelled to answer, upon oath, interrogatories annexed to the complaint in such civil action for the purpose of discovery of his liability; and upon discovery and repayment of the money or other thing, the person discovering and repaying the same, with costs and such an amount of exemplary damages as may be agreed upon by the parties, or fixed by the court, shall be acquitted and discharged from any further or other forfeiture, punishment, penalty, or prosecution he or they may have incurred for so winning such money or thing, discovered and repaid.

History: En. Sec. 18, Ch. 115, L. 1907; Discovery⊖30; Gaming⊖42 (1).
re-en. Sec. 8433, Rev. C. 1907; re-en. Sec. 27 C.J.S. Discovery § 23; 38 C.J.S. Gam-
ing §§ 38, 39.
11176, R. C. M. 1921.

94-2422. (11177) Lessor of buildings used for gambling purposes treated as principal. Whenever premises are occupied for the doing of any of the things, or running any of the games prohibited by this act, the lease or agreement under which they are so occupied shall be absolutely void at the instance of the lessor, who may at any time obtain possession by civil action, or by action of forcible detainer; and if any person lease premises for any such purpose, or knowingly permits them to be used or occupied for such purpose or purposes, or knowing them to be so occupied or used, fails immediately to prosecute, in good faith an action or proceeding for the recovery of the premises, such lessor shall be considered in all cases, civil and criminal, as a principal in running the games or doing the things run or done in such building, in violation of this act, and shall be dealt with and punished accordingly.

History: En. Sec. 19, Ch. 115, L. 1907; Married woman's criminal responsibility
re-en. Sec. 8434, Rev. C. 1907; re-en. Sec. for keeping gaming house. 4 ALR 282.
11177, R. C. M. 1921.

Gaming⊖79 (1); Landlord and Tenant
⊖29 (3).

38 C.J.S. Gaming §§ 83, 99, 101; 51
C.J.S. Landlord and Tenant § 226.

24 Am. Jur. 427, Gaming and Prize Con-
tests, § 42.

Connection with place where gaming is
carried on which will render one guilty as
keeper thereof. 15 ALR 1202.

What is "outhouse" where people resort
within meaning of statute as to gaming.
20 ALR 243.

94-2423. (11178) Immunity of witnesses. No person shall be excused from attending or testifying or producing any books, papers, documents, or any thing or things, before any court or magistrate upon any investigation, proceeding or trial for a violation of any of the provisions of this act, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to convict him of a crime, or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any trans- action, matter or thing concerning which he may so testify or produce evidence of, documentary or otherwise; and no testimony or evidence so

given or produced shall be received against him in any civil or criminal proceeding, action, or investigation.

History: En. Sec. 20, Ch. 115, L. 1907; Criminal Law 42; Witnesses 297.
re-en. Sec. 8435, Rev. C. 1907; re-en. Sec. 22 C.J.S. Criminal Law §§ 41, 46; 70
11178, R. C. M. 1921. C.J. Witnesses § 869 et seq.

94-2424. (11179) Ordinances in conflict with this act void. Upon the passage of this act, all ordinances and parts of ordinances of cities and towns in this state regarding gambling and gambling-houses shall be inoperative and void, and thereafter no ordinance regarding gambling or gambling-houses shall be passed by any city or town.

History: En. Sec. 21, Ch. 115, L. 1907; Municipal Corporations 78.
re-en. Sec. 8436, Rev. C. 1907; re-en. Sec. 43 C.J. Municipal Corporations § 309.
11179, R. C. M. 1921.

94-2425. (11180) Racing bets unlawful. It shall be unlawful to make or report or record or register any bet or wager upon the result of any contest of speed or skill or endurance of animal or beast, whether such contest is held within or without the state of Montana, except that it shall be lawful for any and all patrons, except minors, of a fair or racing association to contribute entrance fees toward the purse in races to be given by any fair or racing association and it shall be lawful except on Sundays for any fair or racing association to divide the purses among such patrons for a period of not more than thirty days in any one year in all counties having a population of forty thousand people, or more, according to the United States census last preceding such fair or race meeting and also lawful in other counties for patrons, except minors, of a fair or racing association to contribute entrance fees toward the purse in races to be given by any fair or racing association and it shall be lawful except on Sundays for any fair or racing association to divide the purses among such patrons, for a period of not more than six days in any one year. The entrance fees may be recorded and such recording shall not be an unlawful wager.

History: En. Sec. 1, Ch. 20, L. 1909; amd. Sec. 1, Ch. 92, L. 1909; amd. Sec. 1, Ch. 55, L. 1915; re-en. Sec. 11180, R. C. M. 1921; amd. Sec. 1, Ch. 103, L. 1929.

Operation and Effect

Evidence held insufficient to justify conviction of a telegraph company for transmitting information for the purpose of having a bet or wager made upon a horse-race in violation of this act. *State v. Postal Telegraph Cable Co.*, 53 M 104, 107, 161 P 953.

Id. Since the offense denounced by this act consists of transmitting information concerning a horserace for the purpose of having bets or wagers made, an instruction would be given in a prosecution for such an offense that it is not wrongful to transmit such information if bets or wagers are not to be made.

Under this case, held, that the district court erred in enjoining a county attorney, at the instance of an association promoting dog races, from applying for an injunction to prevent it from proceeding with the

holding of races, and from causing the arrest of its officers and agents for violating the provisions of this section, no contention being advanced that the Act is invalid, and the allegations that the association would be irreparably damaged by the threatened action of the attorney and that the latter was insolvent being insufficient to warrant the equitable relief granted. *State v. District Court et al.*, 85 M 439, 279 P 234.

References

Cited or applied as section 1, chapter 92, Laws of 1909, before amendment, in *State v. Rose*, 40 M 66, 70, 105 P 82; *State v. Sylvester*, 40 M 79, 105 P 86; *Toomey v. Penwell et al.*, 76 M 166, 170, 245 P 943; *State v. District Court et al.*, 85 M 439, 279 P 234; *State v. Gateway Mortuaries, Inc.*, et al., 87 M 225, 253, 287 P 156.

Agriculture 5; Gaming 71.

3 C.J.S. Agriculture § 14; 38 C.J.S. Gaming §§ 1, 81, 88, 89.

94-2426. (11181) Who deemed a principal. Any person who aids or abets in the commission of any of the acts herein declared to be unlawful, either by transmitting or communicating or transferring money or other thing of value, or information for the purpose of having bets or wagers made or reported or recorded or registered, shall be deemed a principal in the commission of such offense.

History: En. Sec. 3, Ch. 20, L. 1909; re-en. Sec. 3, Ch. 92, L. 1909; re-en. Sec. 2, Ch. 55, L. 1915; re-en. Sec. 11181, R. C. M. 1921.

Laws of 1909, before amendment, in State v. Rose, 40 M 66, 70, 105 P 82.

Gaming 79 (1).

38 C.J.S. Gaming §§ 83, 99, 101.

References

Cited or applied as section 3, chapter 92,

94-2427. (11182) Violation of act a misdemeanor. Every person or persons violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars or more than one thousand dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

History: En. Sec. 4, Ch. 20, L. 1909; re-en. Sec. 4, Ch. 92, L. 1909; re-en. Sec. 3, Ch. 55, L. 1915; re-en. Sec. 11182, R. C. M. 1921.

Gaming 106.

38 C.J.S. Gaming § 132.

94-2428. (11183) Act, when effective. This act is hereby declared to be necessary for the immediate preservation of the public peace, health, and safety, and shall take effect from and after its passage and approval by the governor.

History: En. Sec. 5, Ch. 55, L. 1915; re-en. Sec. 11183, R. C. M. 1921.

Gaming 63 (2).

38 C.J.S. Gaming § 2.

CHAPTER 25

HOMICIDE

- Section 94-2501. Murder defined.
 94-2502. Malice defined—express or implied.
 94-2503. Degrees of murder.
 94-2504. Repealing clause.
 94-2505. Punishment for murder.
 94-2506. Petit treason abolished.
 94-2507. Manslaughter—voluntary and involuntary.
 94-2508. Punishment for manslaughter.
 94-2509. Deceased must die within a year and a day.
 94-2510. Proof of corpus delicti.
 94-2511. Excusable homicide.
 94-2512. Justifiable homicide by public officers.
 94-2513. Justifiable homicide by other persons.
 94-2514. Bare fear not to justify killing.
 94-2515. Justifiable and excusable homicide not punishable.

94-2501. (10953) Murder defined. Murder is the unlawful killing of a human being with malice aforethought.

History: En. Sec. 15, p. 178, Bannack Stat.; re-en. Sec. 18, p. 273, Cod. Stat. 1871; re-en. Sec. 18, 4th Div. Rev. Stat. 1879; re-en. Sec. 18, 4th Div. Comp. Stat. 1887; re-en. Sec. 350, Pen. C. 1895; re-en. Sec. 8290, Rev. C. 1907; re-en. Sec. 10953, R. C. M. 1921. Cal. Pen. C. Sec. 187.

Cross-References

Death caused by holdup of train, sec. 94-3207.

Jurisdiction when party dies in another county, sec. 94-5614.

Limitation of action, sec. 94-5701.

Proof in homicide cases, secs. 94-7212, 94-7213.

Distinction Between Murder and Manslaughter

The distinction between murder and manslaughter is that the element of malice aforethought enters into the former, while it is wanting in the latter. *State v. Sloan*, 22 M 293, 302, 56 P 364.

Sufficiency of Indictment or Information

An indictment for murder, good at common law, is good under the statute. *Territory v. Stears*, 2 M 324, 327; *Territory v. Young*, 5 M 242, 243, 5 P 248; *State v. Lu Sing*, 34 M 31, 35, 85 P 521; *State v. McGowan*, 36 M 422, 428, 93 P 552.

In an information for murder, it is sufficient to allege that the killing was with malice aforethought. The elements of premeditation and deliberation are matters of proof. *Territory v. Stears*, 2 M 324, 327; *Territory v. McAndrews*, 3 M 158, 161; *State v. Metcalf*, 17 M 417, 420, 43 P 182; *State v. Lu Sing*, 34 M 31, 35, 85 P 521; *State v. Hayes*, 38 M 219, 221, 99 P 434; *State v. Nielson*, 38 M 451, 454, 100 P 229. See also *State v. Guerin*, 51 M 250, 257, 152 P 747.

An information charging a husband with a wilful failure to provide for his wife and to protect her from the cold and inclement weather, as a result of which she died, will sustain a conviction for murder in the second degree. *Territory v. Manton*, 7 M 162, 168, 14 P 637.

An information charging that accused committed a murder wilfully, unlawfully, feloniously, and premeditatedly, and of his malice aforethought, charges murder in the first degree, though it fails to use the word "deliberately." *State v. Hliboka*, 31 M 455, 457, 78 P 965.

An information stating that the defendant unlawfully, feloniously, wilfully, premeditatedly, deliberately, and of his malice aforethought, shot and killed a person named, a human being, sufficiently charges murder. *State v. Crean*, 43 M 47, 53, 114 P 603.

When Evidence of Other Crimes Admissible

Held, that in a prosecution for the killing of a peace officer, evidence concerning statements made by defendant that prior thereto he had killed two other persons was admissible for the purpose of showing his motive in killing the officer, he in a confession having stated that he believed the killing of the other two was known two days prior to the appearance of the officer at his ranch apparently for the purpose of arresting him, under the rule of admissibility of evidence of other crimes to prove motive, intent, absence of mistake, common plan or scheme, or identity. *State v. Simpson*, 109 M 198, 208, 95 P 2d 761.

References

Cited or applied as section 8290, Revised Codes, in *State v. Colbert*, 58 M 584, 591, 194 P 145; *State v. Bess*, 60 M 558, 576, 199 P 426; *State v. Mumford*, 69 M 424, 433, 222 P 447; *State v. Chavez*, 85 M 544, 549, 281 P 352; *State v. Park*, 88 M 21, 289 P 1037; *State v. Gunn*, 89 M 453, 464 et seq., 300 P 212.

Homicide

40 C.J.S. Homicide § 13.

26 Am. Jur., Homicide, p. 161, §§ 11 et seq.; p. 181, §§ 37 et seq.

Wife's confession of adultery as affecting degree of homicide in killing her paramour. 10 ALR 470.

Homicide in connection with use of automobile for unlawful purpose or in violation of law. 16 ALR 914.

Homicide by unlawful acts aimed at another. 18 ALR 917.

Time elapsing between wound and death as affecting homicide. 20 ALR 1006.

Humanitarian motives for homicide. 25 ALR 1007.

Intoxication as affecting question of intent or malice. 79 ALR 899.

Necessity of intent to kill to bring death resulting from arson within statute making homicide in perpetration of felony murder in first degree. 87 ALR 414.

Homicide by companion of defendant while attempting to make escape from scene of crime as murder in first degree. 108 ALR 847.

94-2502. (10954) Malice defined—express or implied. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

History: Ap. p. Secs. 16, 17, pp. 178, 179, *Bannack Stat.*; re-en. Secs. 19, 20, p. 273, *Cod. Stat. 1871*; re-en. Secs. 19, 20, 4th Div. *Rev. Stat. 1879*; re-en.

Secs. 19, 20, 4th Div. *Comp. Stat. 1887*; en. Sec. 351, *Pen. C. 1895*; re-en. Sec. 8291, *Rev. C. 1907*; re-en. Sec. 10954, *R. C. M. 1921. Cal. Pen. C. Sec. 188.*

Operation and Effect

It is not essential to a conviction of murder that a motive for the crime be shown. Malice may be inferred from the fact that no considerable provocation appears, or that the circumstances attending the killing show an abandoned and malignant heart. *State v. Roberts*, 44 M 243, 245, 119 P 566.

In a prosecution for murder, the jury is justified in finding a malicious intent to take human life, where the defendant, a short time prior to the killing, declared his intention of shooting the person whom he should see in possession of his saddlehorse, and where he did so, though the victim was a stranger to him. *State v. Leakey*, 44 M 354, 366, 120 P 234.

The malice which brands a homicide as murder may be express or implied, and on proof of the homicide by defendant, in the absence of evidence tending to show

that the act amounted only to manslaughter or that the killing was justifiable or excusable, malice is presumed and the crime is presumed to be murder in the second degree. *State v. Chavez*, 85 M 544, 549, 281 P 352.

References

Cited or applied as section 351, Penal Code, in *State v. Hliboka*, 31 M 455, 457, 78 P 965; as section 8291, Revised Codes, in *State v. Halk*, 49 M 173, 175, 141 P 149; *State v. Reagin*, 64 M 481, 489, 210 P 86; *State v. Mumford*, 69 M 424, 434, 222 P 447; *State v. Park*, 88 M 21, 32, 289 P 1037.

Homicide § 12, 13.

40 C.J.S. Homicide §§ 16, 18, 20, 23-26.

Intoxication as affecting question of intent or malice. 79 ALR 899.

94-2503. (10955) Degrees of murder. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, or perpetrated from a deliberate and premeditated design, unlawfully and maliciously, to effect the death of any human being other than him who is killed, is murder of the first degree; and all other kinds of murder are of the second degree.

History: En. Sec. 17, p. 179, *Bannack Stat.*; re-en. Sec. 21, p. 273, *Cod. Stat.* 1871; re-en. Sec. 21, 4th Div. *Rev. Stat.* 1879; re-en. Sec. 21, 4th Div. *Comp. Stat.* 1887; amd. Sec. 352, *Pen. C.* 1895; re-en. Sec. 8292, *Rev. C.* 1907; amd. Sec. 1, *Ch. 3, L.* 1919; re-en. Sec. 10955, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 189.

Burden of Proof

To sustain a conviction of murder in the first degree, it is incumbent upon the state to show by the record not only that it discharged the burden resting upon it to establish the killing by defendant, but also that it proved deliberation and premeditation on his part. *State v. Gunn*, 85 M 553, 555, 281 P 757.

After the state has made proof of the homicide charged, the crime is presumed to be murder in the second degree, the burden then resting upon the state to introduce evidence satisfying the jury beyond a reasonable doubt that there was deliberation and premeditation to raise the crime to murder in the first degree. *State v. Le Duc*, 89 M 545, 562, 300 P 919.

Circumstantial Evidence Will Warrant First Degree

Evidence, entirely circumstantial in character, in a prosecution for murder in the first degree charged to have been

committed by defendant and another, transients traveling on a freight train while robbing, or attempting to rob, another transient, held sufficient to warrant conviction of the crime as charged. *State v. Miller*, 91 M 596, 598, 9 P 2d 474.

Evidence Insufficient to Warrant Murder in First Degree

Defendant, keeper of a roadhouse where intoxicating liquor was sold, several hours after three men, with two of whom he had had a quarrel, had left the place, and about 1 o'clock in the morning, was driving in an automobile to a neighboring town when he observed the car of the three stalled in the road. A fight ensued with the two with whom he had quarreled, in the course of which he killed one. His defense was self-defense. While the testimony of the other two made little mention of an encounter, the ground where the shooting occurred showed evidence of a desperate struggle; it also appeared that defendant, among other injuries, sustained a broken leg and was confined in a hospital for nearly six months. Held, that the evidence was insufficient to sustain a verdict of murder in the first degree. *State v. Gunn*, 85 M 553, 555, 281 P 757.

Evidence reviewed and held insufficient to warrant a verdict of murder in the first degree, the state having failed to sustain

the burden resting upon it to establish the killing by the defendant, who had pleaded self-defense, with deliberation and premeditation, but sufficient, in view of the rule that a verdict of murder in the first degree necessarily implies the finding of all the essential elements of murder in the second degree, to establish the latter crime. *State v. Gunn*, 89 M 453, 463 et seq., 300 P 212.

Instructions on Degrees of Murder

In a prosecution for murder in the first degree, appellant may not complain of the failure of the court to instruct on the subjects of manslaughter or murder of the second degree in the absence of an offer by him of instructions on those subjects. *State v. Reagin*, 64 M 481, 490, 210 P 86.

Id. Murder committed in the perpetration or attempt to perpetrate robbery, burglary, etc., is murder of the first degree, and murder so committed is not divisible into degree; hence the court need not in such a prosecution instruct as to murder of the second degree or manslaughter.

Where a homicide is committed in the perpetration of or attempt to perpetrate any of the crimes mentioned in this section, it is murder in the first degree, and the court need not in its instructions define murder of the second degree, or manslaughter. *State v. Bolton*, 65 M 74, 81, 212 P 504.

As a general rule the district court, in a trial for homicide, need not give an instruction on second degree murder where the killing is charged to have been perpetrated in the commission of one of the felonies enumerated in this section, or where there is no evidence tending to show a lesser offense than murder in the first degree. *State v. Le Duc*, 89 M 545, 562, 300 P 919.

Id. Held, under the evidence, that the trial court did not err in giving an instruction on murder in the second degree, as against the contention of defendant that under his plea of self-defense he was either guilty of murder in the first degree or not guilty. (Mr. Justice Angstman dissenting.)

Id. Where defendant was convicted of murder in the second degree, he was not prejudiced by an instruction that the deliberation and premeditation necessary to raise the crime to murder in the first degree may be formed in an instant, even though it be assumed that the instruction was erroneous.

In a prosecution for crime including offenses of lesser degree than that charged, the jury need not be instructed on such lesser degrees unless the evidence would warrant a conviction of such other crimes.

State v. Miller, 91 M 596, 598, 9 P 2d 474.

Id. Where the evidence in a prosecution for homicide discloses that the crime was committed during a robbery or an attempt to commit it, or fails to show that fact beyond a reasonable doubt, the only permissible verdict, under this section, on the one hand, is one of murder in the first degree, or, on the other, of acquittal, and under such conditions the court is not required to instruct on murder in the second degree; the rule being the same where the state relies on circumstantial evidence for conviction.

Lying in Wait

Where defendant had robbed a bank and in the course of his escape drove his automobile into a coulee, stopped his machine and when deceased, one of the pursuers, appeared on the top of a hill, shot him, an instruction that homicide committed by lying in wait constitutes murder in the first degree was correct. *State v. Jackson*, 71 M 421, 428, 230 P 370.

Murder Committed in Perpetration of Certain Crimes Is First Degree

Where homicide is committed in the perpetration of or attempt to perpetrate robbery the result is murder in the first degree (this section), irrespective of the absence of intent in the accused to commit the latter crime, it being sufficient for conviction if he was capable of entertaining the felonious intent to commit robbery. *State v. Reagin*, 64 M 481, 490, 210 P 86.

Where two defendants, tried separately, had entered into a conspiracy to commit robbery by taking incriminating evidence from the possession of an officer in the perpetration of which the latter was killed by one of them, the information against the other charging a premeditated killing need not set forth the facts constituting the crime of robbery or allege that in the attempt to commit the latter crime the homicide was committed. *State v. Bolton*, 65 M 74, 81, 212 P 504.

Id. Under this section, making all murder committed in the perpetration of or attempt to perpetrate any of the crimes therein mentioned murder in the first degree, an information charging that the killing was wilful, deliberate, premeditated and with malice aforethought is sufficient to admit of proof that the killing was committed in the perpetration or attempt to perpetrate any one of such felonies.

Where defendant, after robbing a bank, escaped in an automobile with the money, pursuit being at once begun and continued uninterruptedly for about thirty miles, and shot one of the pursuers, an instruction

that if the jury believed that defendant committed the crime of robbery and while escaping killed deceased, he was guilty of murder in the first degree, was proper under this section, the robbery at the time of the shooting having then still been in the process of commission. *State v. Jackson*, 71 M 421, 428, 230 P 370.

All who participate in a robbery, or an attempted robbery, during which a homicide is committed, are guilty of murder in the first degree, irrespective of which one of the participants fired the fatal shot. *State v. Miller*, 91 M 596, 598, 9 P 2d 474.

Evidence in a prosecution for murder committed at night-time in the perpetration of burglary, supported by a full confession by defendant, held sufficient to warrant the extreme penalty. *State v. Zorn*, 99 M 63, 71, 41 P 2d 513.

Murder in the Second Degree

To constitute murder in the second degree it is not necessary that the specific intent to take life must have accompanied the act of killing. If the killing was done unlawfully with malice aforethought it is sufficient; hence where one fires at the assailant of another but by reason of poor marksmanship or change of position of the combatants kills the one whom he sought to protect, the crime is murder in the second degree. *State v. Chavez*, 85 M 544, 550, 281 P 352.

Id. Defendant convicted of murder in the second degree on appeal contended that the evidence warranted a verdict of guilty of no greater crime than manslaughter. Evidence showing that defend-

ant, angry at being awakened from sleep by a quarrel in an adjoining room between his cousin and one of the three other men there present, intentionally fired three bullets into the room either in reckless disregard of the safety of the men or directly at the cousin or at the man with whom he was fighting, killing the former, held sufficient to warrant a verdict of guilty of murder, in the second degree, under the above rules.

Sufficiency of Indictment Charging First Degree Murder

It is not necessary to allege that the acts of the accused were done deliberately to sustain a conviction of murder of the first degree, and allegations sufficient for a common law indictment will be sufficient for an information. *State v. Lu Sing*, 34 M 31, 35, 85 P 521. See also *State v. McGowan*, 36 M 422, 428, 93 P 552; *State v. Wolf*, 56 M 493, 496, 185 P 556.

References

Cited or applied as section 352, Penal Code, before amendment, in *State v. Martin*, 29 M 273, 280, 74 P 725; in *State v. Hliboka*, 31 M 455, 457, 78 P 965; as section 8292, Revised Codes, before amendment, in *State v. Crean*, 43 M 47, 53, 114 P 603; *State v. Caterni*, 54 M 456, 458, 171 P 284; *State v. Vuckovich*, 61 M 480, 203 P 491; *State v. Harris*, 66 M 25, 31, 213 P 211; *State v. Mumford*, 69 M 424, 435, 222 P 447.

Homicide 22 (1-3), 23 (1, 2).

40 C.J.S. Homicide §§ 31, 33, 34, 35.

94-2504. (10956) Repealing clause. All acts and parts of acts in conflict herewith are hereby repealed; provided, that nothing herein contained shall be construed to relieve any person from prosecution for murder which shall have been committed prior to the approval of this act, but the same shall be prosecuted under the provisions of the preceding section, notwithstanding such repeal, and said section shall be continued in force for the purpose of such prosecutions only.

History: En. Sec. 2, Ch. 3, L. 1919; re-en. Sec. 10956, R. C. M. 1921.

Homicide 8.

40 C.J.S. Homicide § 13.

94-2505. (10957) Punishment for murder. Every person guilty of murder in the first degree shall suffer death, or shall, in the discretion of the jury, or of the court, if the punishment be left to the court, be imprisoned in the state prison for the term of his natural life; and every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years.

History: Earlier acts were Sec. 17, p. 179, Bannack Stat.; Sec. 25, p. 274, Cod. Stat. 1871; Sec. 25, 4th Div. Rev. Stat. 1879; Sec. 25, 4th Div. Comp. Stat. 1887; Sec. 353, Pen. C. 1895.

This section en. Sec. 1, Ch. 179, L. 1907; re-en. Sec. 8293, Rev. C. 1907; re-en. Sec. 10957, R. C. M. 1921. Cal. Pen. C. Sec. 190.

Operation and Effect

Where the accused, in a prosecution for murder, fails to raise in the minds of the jurors a reasonable doubt as to his guilt, the jury is justified in finding the highest degree of the crime, and in fixing the death penalty. *State v. Leakey*, 44 M 354, 366, 120 P 234.

References

Cited or applied as section 353, Penal

94-2506. (10958) Petit treason abolished. The rules of the common law, distinguishing the killing of a master by his servant, and of a husband by his wife, as petit treason, are abolished, and these offenses are homicides, punishable in the manner prescribed by this chapter.

History: En. Sec. 354, Pen. C. 1895; re-en. Sec. 8294, Rev. C. 1907; re-en. Sec. 10958, R. C. M. 1921. Cal. Pen. C. Sec. 191.

Homicide—354.

41 C.J.S. Homicide §§ 433, 434, 435, 436.

26 Am. Jur. 567, Homicide, §§ 580 et seq.

Homicide—1.

40 C.J.S. Homicide § 2.

94-2507. (10959) Manslaughter—voluntary and involuntary. Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds:

1. Voluntary, upon a sudden quarrel or heat of passion.

2. Involuntary, in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection.

History: Prior to 1895, the law governing manslaughter and excusable and justifiable homicide differed materially from the present law. See Secs. 18-31, pp. 179-181, Bannack Stat.; re-en. as Secs. 26-38, pp. 274-276, Cod. Stat. 1871; re-en. as Secs. 26-38, 4th Div. Rev. Stat. 1879; re-en. as Secs. 26-38, 4th Div. Comp. Stat. 1887; en. Sec. 355, Pen. C. 1895; re-en. Sec. 8295, Rev. C. 1907; re-en. Sec. 10959, R. C. M. 1921. Cal. Pen. C. Sec. 192.

Criminal Negligence

It must be remembered that criminal liability cannot be predicated on every careless act performed merely because such carelessness results in injury to another. The mere happening of an accident, standing alone is not proof of negligence. Evidence in a manslaughter prosecution showing that defendant driver, blinded by bright lights of an approaching car, drove off the highway into a shallow depression hidden by brush filled with a pile of rocks, causing the car to sideswipe a tree, held insufficient to sustain conviction on theory of criminal negligence. *State v. Bast*, 116 M 329, 337, 151 P 2d 1009.

Subd. 2

"In An Unlawful Manner, or Without Due Caution or Circumspection"

There must be a higher degree of negligence than is required to establish negligent default on a mere civil issue to im-

pose criminal responsibility under the phrase in this section "in an unlawful manner, or without due caution or circumspection." The negligence must be aggravated, culpable, gross, or reckless, such a departure from the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or in other words, a disregard for human life or an indifference to consequences. Judgment in case at bar reversed for failure to prove the requisite negligence. *State v. Powell*, 114 M 571, 576, 138 P 2d 949.

Motion Requiring State to Elect Between Voluntary and Involuntary Manslaughter

Motion of defendant, charged with manslaughter, at the close of the state's cause, requiring the state to elect as to the kind of manslaughter it was relying upon, whether voluntary or involuntary, held, properly denied, where the character of the evidence introduced by the prosecution showed that it was attempting to make a case of involuntary manslaughter, and that defendant at no time had any reasonable ground for assuming that his defense would have to be other than for such offense. *State v. Robinson*, 109 M 322, 328, 96 P 2d 265.

Operation and Effect

The negligent handling of a loaded fire-

arm causing or contributing to the death of another person, is involuntary manslaughter within the meaning of subdivision 2 of this section. *State v. Kuun*, 55 M 436, 446, 178 P 288.

Where there is evidence showing defendant to be guilty of either murder of the first or second degree or manslaughter, the court must explicitly instruct the jury that a verdict of manslaughter may be returned, under the rule that where the evidence warrants it, instructions must be given upon every offense included in the crime charged. *State v. Mumford*, 69 M 424, 435, 222 P 447.

Held, that an information charging that defendant "did wilfully, unlawfully, knowingly and feloniously kill one B., a human being, contrary to the form," etc., was sufficient to charge manslaughter, as against the objection that it was fatally defective in not alleging that the crime had been either voluntarily or involuntarily committed. *State v. Gondeiro*, 82 M 530, 538, 268 P 507.

To warrant conviction of the crime of involuntary manslaughter by reason of the commission of an unlawful act, it must appear that the doing of the unlawful act contributed to or was the proximate cause of the death. *State v. Darchuck*, 117 M 15, 17, 156 P 2d 173.

References

Cited or applied as section 355, Penal Code, in *State v. Sloan*, 22 M 293, 302, 56 P 364; as section 8295, Revised Codes, in *State v. Schaefer*, 35 M 217, 221, 88 P 792; *State v. Crean*, 43 M 47, 53, 114 P 603; *State v. Chavez*, 85 M 544, 549, 281 P 352.

94-2508. (10960) Punishment for manslaughter. Manslaughter is punishable by imprisonment in the state prison not exceeding ten years.

History: En. Sec. 356, Pen. C. 1895; re-en. Sec. 8296, Rev. C. 1907; re-en. Sec. 10960, R. C. M. 1921. Cal. Pen. C. Sec. 193.

94-2509. (10961) Deceased must die within a year and a day. To make the killing either murder or manslaughter, it is requisite that the party die within a year and a day after the stroke received or the cause of death administered; in the computation of which the whole of the day on which the act was done shall be reckoned the first.

History: En. Sec. 23, p. 180, Bannack Stat.; re-en. Sec. 30, p. 275, Cod. Stat. 1871; re-en. Sec. 30, 4th Div. Rev. Stat. 1879; re-en. Sec. 30, 4th Div. Comp. Stat. 1887; re-en. Sec. 357, Pen. C. 1895; re-en. Sec. 8297, Rev. C. 1907; re-en. Sec. 10961, R. C. M. 1921. Cal. Pen. C. Sec. 194.

Operation and Effect

It is not necessary to allege in an information for murder the date upon which

Homicide §§ 31, 33, 34.

40 C.J.S. Homicide §§ 37, 39, 40, 43, 44, 55-57, 116.

See 26 Am. Jur. 165, Homicide, §§ 17 et seq.

Negligent homicide by overturning boat. 3 ALR 1104.

Improper treatment of disease. 9 ALR 211.

Pregnancy as element of offense of attempt to procure a miscarriage or of homicide predicated on such attempt. 10 ALR 314.

Homicide by failure to provide medical or surgical attention. 10 ALR 1137.

Guilt of one aiding or abetting suicide. 13 ALR 1259.

Evidence in prosecution for homicide in attempting to produce abortion, of dying declarations with respect to transactions prior to the homicide. 14 ALR 760.

Manslaughter or assault in connection with use of automobile for unlawful purpose or in violation of law. 16 ALR 914.

Killing by set gun or similar device on defendant's own property. 19 ALR 1437.

Homicide in defense of habitation or property. 25 ALR 508.

Criminal homicide by excessive or improper punishment of child. 37 ALR 709.

Intoxication as reducing homicide from murder to manslaughter. 79 ALR 904.

Sleep or drowsiness of operator of automobile as affecting charge of negligent homicide. 160 ALR 515.

Test or criterion terms "culpable negligence," "criminal negligence," or "gross negligence," appearing in statute defining or governing manslaughter. 161 ALR 10.

References

Cited or applied as section 356, Penal Code, in *State v. Gay*, 18 M 51, 59, 44 P 411.

the death occurred as distinguished from the date of assault. All that is necessary in order to constitute the crime of murder, the other requisite facts being proven, is that the death of the party occurred within a year and a day after the stroke received or the cause of death administered. *State v. Powers*, 39 M 259, 267, 102 P 583.

References

Cited or applied as section 357, Penal

Code, in *State v. Keerl*, 29 M 508, 511,
75 P 362.

Homicide⇒6.
40 C.J.S. Homicide § 12.

94-2510. (10962) Proof of corpus delicti. No person can be convicted of murder or manslaughter unless the death of the person, alleged to have been killed, and the fact of the killing by the defendant as alleged, are established as independent acts; the former by direct proof, and the latter beyond a reasonable doubt.

History: En. Sec. 358, Pen. C. 1895; re-en. Sec. 8298, Rev. C. 1907; re-en. Sec. 10962, R. C. M. 1921.

Cross-Reference

Proof in homicide cases, secs. 94-7212, 94-7213.

Applies Only to Homicide

As against the contention of appellant in a prosecution for knowingly receiving stolen property, a calf in the instant case, stolen from the range, that the corpus delicti had not been established, the rule is that while in homicide cases proof in that behalf must be by direct evidence, in all other cases the fact may be established by circumstantial evidence and, in such a case as the one at bar, even by the testimony of the thief himself. *State v. Webber*, 112 M 284, 292, 116 P 2d 679.

Operation and Effect

Since the corpus delicti is directly proved when a dead body is found under circumstances warranting an inference that a person has been feloniously killed, direct proof of the identity of the victim is not required, but only direct proof of death. *State v. Pepo*, 23 M 473, 481, 59 P 721.

In prosecutions for murder, proof of the corpus delicti involves the establishment of the fact that a murder has been committed, but includes neither the identity of the person alleged to have been killed, nor the killing by the person accused. *State v. Calder*, 23 M 504, 513, 59 P 903; *State v. Nordall*, 38 M 327, 338, 99 P 960; *State v. Riggs*, 61 M 25, 52, 201 P 272.

Where, on a trial for murder, the identity of the person alleged to have been killed was proved by the direct evidence of an accomplice, who was an eye-witness, and the death of a human being was directly proved, and there was circumstantial evidence to prove the identity of the deceased, the evidence was sufficient to satisfy the requirements of this section,

that the "death" of the person alleged to have been killed must be established by "direct proof," as an independent fact, and of section 93-301-9. *State v. Calder*, 23 M 504, 508, 59 P 903.

In a prosecution for murder, this section does not require direct proof of the identity of the victim, or of the fact that the killing was done by the defendant, but only of the fact of death. *State v. Nordall*, 38 M 327, 338, 99 P 960.

Under this section, the only fact required to be proved directly to establish the corpus delicti in a murder case is the death of the person alleged to have been killed, but the identity of such person, if in doubt, and the fact that defendant did the killing may be proved by direct, or by indirect or circumstantial evidence. *State v. Kindle et al.*, 71 M 58, 64, 227 P 65.

Held, that the corpus delicti in all criminal prosecutions (except in cases of homicide, this section) need not be established by direct and positive proof but may be proved by circumstantial evidence, and that in the instant case (burglary) it was so proven, the fact that there was no evidence to show how the entry was made being immaterial. *State v. Dixon*, 80 M 181, 192, 260 P 138.

Where Corpus Delicti Sufficiently Established

The circumstances presented, together with the confession, held amply to meet the requirements of this section in sufficiently establishing the corpus delicti to sustain the finding of the jury. *State v. Ratkovich*, 111 M 19, 24, 105 P 2d 679.

References

Cited or applied as section 358, Penal Code, in *State v. Keerl*, 29 M 508, 511, 75 P 362.

Homicide⇒228 (1).

41 C.J.S. Homicide § 312.

26 Am. Jur., Homicide, p. 475, §§ 461, 462; p. 490, § 482.

94-2511. (10963) Excusable homicide. Homicide is excusable in the following cases:

1. When committed by accident or misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.

2. When committed by accident or misfortune, in the heat of passion, upon any sudden or sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in any cruel or unusual manner.

History: En. Sec. 359, Pen. C. 1895; re-en. Sec. 8299, Rev. C. 1907; re-en. Sec. 10963, R. C. M. 1921. Cal. Pen. C. Sec. 196.

the determination of the jury. *State v. Kuam*, 55 M 436, 446, 178 P 288.

References

State v. Bast, 116 M 329, 339, 151 P 2d 1009.

Operation and Effect

To justify a finding that a homicide by shooting was excusable, where defendant and deceased were strangers, the evidence must show that, when the shot was fired, defendant was doing a lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent. *State v. Kuam*, 55 M 436, 444, 178 P 288.

The question whether defendant, while intoxicated and in the act of exhibiting his revolver to the deceased, also under the influence of liquor, exercised that usual and ordinary caution in handling the weapon made necessary by this section to render the killing excusable, was one for

Homicide 101, 125.

40 C.J.S. Homicide §§ 1, 97-99, 107, 112, 116.

26 Am. Jur. 226, Homicide, §§ 102 et seq.

Homicide in attempting to prevent elopement. 8 ALR 660.

Humanitarian motives for homicide. 25 ALR 1007.

Negligent homicide as affected by negligence or other misconduct of decedent. 67 ALR 922.

Intoxication as affecting defense of provocation. 79 ALR 906.

94-2512. (10964) **Justifiable homicide by public officers.** Homicide is justifiable when committed by public officers, and those acting by their command in their aid and assistance, either:

1. In obedience to a judgment of a competent court; or

2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,

3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.

History: Ap. p. Sec. 28, p. 181, *Ban-nack Stat.*; re-en. Sec. 35, p. 275, *Cod. Stat.* 1871; re-en. Sec. 35, 4th Div. Rev. Stat. 1879; re-en. Sec. 35, 4th Div. Comp. Stat. 1887; en. Sec. 360, Pen. C. 1895; re-en. Sec. 8300, Rev. C. 1907; re-en. Sec. 10964, R. C. M. 1921. Cal. Pen. C. Sec. 196.

40 C.J.S. Homicide §§ 1, 97-99, 102, 106, 107, 116, 137.

26 Am. Jur. 226, Homicide, §§ 102 et seq.

Degree of force that may be employed in arresting one charged with misdemeanor. 3 ALR 1170.

Peace officers' criminal responsibility for killing or wounding one whom they wish to investigate or identify. 18 ALR 1368.

Homicide 101, 104, 105.

94-2513. (10965) **Justifiable homicide by other persons.** Homicide is also justifiable when committed by any person in any of the following cases:

1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,

2. When committed in defense of habitation, property, or person, against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,

3. When committed in the lawful defense of such person, or of a wife, or husband, parent, child, master, mistress, or servant of such person, when

there is reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or,

4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

History: En. Sec. 361, Pen. C. 1895; re-en. Sec. 8301, Rev. C. 1907; re-en. Sec. 10965, R. C. M. 1921. Cal. Pen. C. Sec. 197.

Defense of a Wife

On the issue whether defendant, when he killed deceased, believed that deceased was about to assault his wife—defendant's sister—testimony showing that, to defendant's knowledge, deceased had made prior assaults on his wife, was admissible, and the fact that the prior assaults occurred before November 30th, while the homicide occurred December 15th, did not make the evidence inadmissible as too remote. *State v. Felker*, 27 M 451, 458, 71 P 668.

Defense of Others

The provisions of this section put persons acting in defense of others upon the same plane as those acting in defense of themselves. Every fact, therefore, which would be competent to establish justification in the one case would, for the same reasons, be competent to establish it in the other. *State v. Felker*, 27 M 451, 458, 71 P 668.

Prior Threats Admissible

Testimony of prior threats by deceased, though not communicated to defendant, was admissible. *State v. Felker*, 27 M 451, 460, 71 P 668. See also *State v. Hanlon*, 38 M 557, 571, 100 P 1035; *State v. Whitworth*, 47 M 424, 435, 133 P 364; *Trapp v. Territory of New Mexico*, 225 Fed. 968, 971, 141 C. C. A. 28.

Self-Defense

Where, on a trial for murder, in which the accused pleaded self-defense, it was shown that the deceased had previously threatened the accused, an instruction directing the jury to disregard such prior threats unless the accused, at the time of the killing, was actually assailed, or believed he was in great bodily danger, was erroneous. *State v. Shadwell*, 26 M 52, 55, 66 P 508. See also *State v. Hanlon*, 38 M 557, 570, 571, 100 P 1035; *State v. Whitworth*, 47 M 424, 435, 133 P 364; *State v. Jones*, 48 M 505, 519, 139 P 441; *Trapp*

v. Territory of New Mexico, 225 Fed. 968, 971, 141 C. C. A. 28.

Where the trial court, in a prosecution for murder, instructed the jury that the right of self-defense was to be measured by what a reasonable person would have done under like or the same circumstances, the charge conformed to the requirements of this section, and was sufficient. *State v. Houk*, 34 M 418, 423, 87 P 175.

Under this section and the following section, if the party committing the homicide was the assailant, or engaged in mortal combat, he must in good faith have endeavored to decline any further struggle before the killing was done, otherwise he cannot invoke self-defense. *State v. Merk*, 53 M 454, 460, 164 P 655.

Id. A person assailed may act upon appearances as they present themselves to him, meet force with force, and even slay his assailant; and, though in fact he was not in any actual peril, yet if the circumstances were such that a reasonable man would be justified in acting as he did, the slayer will be held blameless.

Id. A person assailed with apparent murderous intent need not retreat and seek a place of safety before slaying his assailant.

One claiming self-defense in a prosecution for murder had a right to act upon appearances and determine for himself whether there was real danger to himself from decedent, and he should be allowed to prove every fact and circumstance known to him and connected with decedent which was fairly calculated to create an apprehension for his own safety when attacked by the latter. *State v. Jennings*, 96 M 80, 88, 28 P 2d 448.

Id. Under the last rule above, held that where defendant charged with murder at the time of the affray was sitting in a pool-hall with his back to the wall, on one side of him a hot stove, and on the other a table, so that there was no avenue of escape when deceased, a much larger man than defendant, and who had threatened to kill him, approached from the front and struck at defendant with a cast-iron cuspidor, whereupon defendant drew a small pocket-knife and inflicted several wounds upon his assailant, one of which

penetrated the brain tissue, the trial court committed error in refusing an offer of proof to show that defendant prior to the affray had been advised by the offered witness that he had been severely cut by deceased about a year prior to defendant's encounter with him.

Id. Where defendant pleading self-defense to a charge of murder was a much smaller and weaker man than deceased, the fact that after the first blow the latter lost his weapon did not deprive defendant of his right to claim self-defense in thereafter retaliating with a knife, since in view of the disparity in physique he could reasonably apprehend great bodily harm to himself even though his assailant was unarmed.

94-2514. (10966) Bare fear not to justify killing. A bare fear of the commission of any of the offenses mentioned in subdivisions 2 and 3 of the preceding section, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.

History: En. Sec. 26, p. 180, Bannack Stat.; re-en. Sec. 33, p. 275, Cod. Stat. 1871; re-en. Sec. 33, 4th Div. Rev. Stat. 1879; re-en. Sec. 33, 4th Div. Comp. Stat. 1887; amd. Sec. 362, Pen. C. 1895; re-en. Sec. 8302, Rev. C. 1907; re-en. Sec. 10966, R. C. M. 1921. Cal. Pen. C. Sec. 198.

Operation and Effect

In a prosecution for murder, where the defendant relies upon the plea of self-defense, an instruction which makes the measure of justification "the sense of danger appearing to the defendant, and to men or individuals of his race," is properly refused. *State v. Cadotte*, 17 M 315, 320, 42 P 857.

Whether the circumstances attending the homicide claimed by defendant to have been committed in self-defense, were such as to justify his fears, as a reasonable person, in the belief that he was in imminent danger of losing his life or suffering great bodily harm at the hands of deceased, is a question of fact for the

References

State v. Daw, 99 M 232, 43 P 2d 240;
State v. Rathbone, 110 M 225, 238, 100 P 2d 86.

Homicide—109 et seq.

40 C.J.S. Homicide §§ 114, 135, 136.

26 Am. Jur. 226, Homicide, §§ 102 et seq.

Homicide in defense of habitation or property. 25 ALR 508.

Humanitarian motives for homicide. 25 ALR 1007.

Negligent homicide as affected by negligence or other misconduct of decedent. 67 ALR 922.

jury; bare fear on his part of an assault by the latter, of a quarrelsome and violent disposition, not alone being insufficient to justify the killing. *State v. Harkins*, 85 M 585, 602, 281 P 551.

Where self-defense is pleaded to a charge of homicide the question whether the circumstances attending it were such as to justify defendant's fears, as a reasonable person, in the belief that he was in imminent danger of losing his life or suffering great bodily harm at the hands of deceased, is one of fact for the jury. *State v. Fine*, 90 M 311, 316, 2 P 2d 1016.

References

Cited or applied as section 362, Penal Code in *State v. Shadwell*, 26 M 52, 55, 66 P 508; *State v. Felker*, 27 M 451, 457, 71 P 668; as section 8302, Revised Codes, in *State v. Merk*, 53 M 454, 460, 164 P 655.

Homicide—116 (4), 122-124.

40 C.J.S. Homicide §§ 108, 109, 111, 126.

94-2515. (10967) Justifiable and excusable homicide not punishable. The homicide appearing to be justifiable or excusable, the person charged must, upon his trial, be fully acquitted and discharged.

History: En. Sec. 32, p. 181, Bannack Stat.; re-en. Sec. 39, p. 276, Cod. Stat. 1871; re-en. Sec. 39, 4th Div. Rev. Stat. 1879; re-en. Sec. 39, 4th Div. Comp. Stat. 1887; amd. Sec. 363, Pen. C. 1895; re-en. Sec. 8303, Rev. C. 1907; re-en. Sec. 10967, R. C. M. 1921. Cal. Pen. C. Sec. 199.

When Requisite Criminal Negligence Not Proved

Evidence in a prosecution for involuntary manslaughter arising out of an automobile accident in city at night time, showing defendant driving at 15 miles per hour, that he did not see deceased, that

he had not been drinking, that he was looking straight ahead but saw nothing to indicate the presence of the pedestrian, etc., held insufficient to warrant a verdict of guilty of such reckless disregard of human life as is required to constitute the offense under section 94-2507, subdivision 2, and judgment reversed with direc-

tion to dismiss the information. *State v. Powell*, 114 M 571, 576, 138 P 2d 949.

References

Cited or applied as section 8303, Revised Codes, in *State v. Powell*, 54 M 217, 221, 169 P 46.

CHAPTER 26

KIDNAPING

- Section 94-2601. Kidnaping—penalty—place of trial.
 94-2602. Kidnaping with intent to send person from state or confine within state—penalty—place of trial.
 94-2603. Enticing away child—penalty.

94-2601. (10970.1) Kidnaping—penalty—place of trial. If any person or persons shall wilfully, without lawful authority, seize, confine, inveigle, decoy, kidnap or abduct or take or carry away by any means whatever, or attempt so to do, any child of any age, or any person or persons and attempt or cause such child or person or persons to be secretly confined against their will, or abducted for the purpose and with the intention of causing the father or mother or any other relative of the person so abducted, or anyone else, to pay or offer to pay any sum as ransom or reward for the return or release of any such child or person or persons, said person or persons so guilty of the above mentioned acts or act, shall, on conviction, be punished by death or imprisonment in the penitentiary not less than five (5) years, at the option of the court or the jury assessing the punishment. Any person or persons charged with such offense may be tried in any county into or through which the person or child so seized, inveigled, decoyed, kidnaped, abducted or otherwise taken shall have been carried or brought.

History: En. Sec. 1, Ch. 102, L. 1933.

Criminal Law—112 (1); Kidnapping—1.

22 C.J.S. Criminal Law § 177; 51 C.J.S. Kidnapping § 2.

See generally, 31 Am. Jur. 811, Kidnapping.

Forcing another to transport one as constituting offense of kidnapping or of abduction. 62 ALR 200.

Secrecy, or intent of secrecy, as a necessary element of kidnapping. 68 ALR 719.

Kidnapping or other criminal offense by taking or removing of child by, or under authority of, parent, or one in loco parentis. 77 ALR 317.

Belief in legality of the act as affecting offense of abduction or kidnapping. 114 ALR 870.

94-2602. (10970.2) Kidnaping with intent to send person from state or confine within state—penalty—place of trial. If any person shall wilfully and without lawful authority, forcibly seize, confine, inveigle, decoy or kidnap any person, with intent to cause such person to be sent or taken out of this state, or to be secretly confined within the same against his will, or shall forcibly carry or send such person out of this state against his will, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten (10) years. Any person charged with such offense may be tried in any county into or through which the person so seized, inveigled, decoyed or kidnaped shall have been taken, carried or brought.

History: En. Sec. 2, Ch. 102, L. 1933.

94-2603. (10970.3) Enticing away child—penalty. Every person who shall maliciously, forcibly or fraudulently lead, take or carry away or decoy or entice away any child under the age of twelve (12) years, with the intent to detain or conceal such child from its parent, guardian or other person having the lawful charge of such child, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding twenty (20) years, or in a county jail not less than six (6) months, or by fine not less than five hundred dollars (\$500).

History: En. Sec. 3, Ch. 102, L. 1933.

CHAPTER 27

LARCENY AND FALSIFICATION OF PUBLIC RECORDS AND JURY LISTS

Section	94-2701.	Larceny defined.
	94-2702.	Uttering fraudulent checks or drafts—evidence.
	94-2703.	Grand and petit larceny.
	94-2704.	Grand larceny defined.
	94-2705.	Petit larceny defined.
	94-2706.	Punishment of grand larceny.
	94-2707.	Punishment of petit larceny.
	94-2708.	Dogs, property.
	94-2709.	Larceny of lost property.
	94-2710.	Larceny of written instruments.
	94-2711.	Value of passage tickets.
	94-2712.	Written instruments completed but not delivered.
	94-2713.	Severing and removing part of the realty.
	94-2714.	Larceny and receiving stolen property out of the state.
	94-2715.	Conversion by trustee, larceny.
	94-2716.	Verbal false pretense, not larceny.
	94-2717.	Claim of title, ground of defense.
	94-2718.	Larceny of gas or electricity.
	94-2719.	Larceny of water, gas and electricity.
	94-2720.	False device for measuring gas, water or electricity.
	94-2721.	Receiver of stolen property.
	94-2722.	Larceny, destruction, etc., of records by officers.
	94-2723.	Larceny, destruction, etc., of records by others.
	94-2724.	Offering forged or false instruments to be recorded.
	94-2725.	Adding names, etc., to the jury lists.
	94-2726.	Falsifying jury lists, etc.

94-2701. (11368) Larceny defined. Every person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person either—

1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing, or secretes, withholds, or appropriates to his own use, or that of any other person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or,

2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement or by competent authority to hold, or take such possession, custody, or control, any money, property, evidence of debt, or contract, article of value of any nature, or thing in action or possession, appropriates the same to

his own use, or that of any other person other than the true owner, or person entitled to the benefit thereof, steals such property and is guilty of larceny.

History: Earlier acts were Secs. 60-64, p. 188, Bannack Stat.; Secs. 72-76, Cod. Stat. 1871; Secs. 72-76, 4th Div. Rev. Stat. 1879; Secs. 78-82, 4th Div. Comp. Stat. 1887.

This section en. Sec. 880, Pen. C. 1895; re-en. Sec. 8642, Rev. C. 1907; re-en. Sec. 11368, R. C. M. 1921. Cal. Pen. C. Sec. 484.

Cross-References

Description of money in indictment, sec. 94-7240.

Indictment, sec. 94-6420.

Obtaining money by false pretenses as larceny, sec. 94-1805.

Obtaining money by gambling as larceny, sec. 94-2405.

Property brought from another county, jurisdiction, sec. 94-5610.

Property brought into state, jurisdiction, sec. 94-5613.

Removal of mortgaged property as larceny, sec. 94-1811.

Sufficiency of evidence, sec. 94-7240.

Verdict to show value of property, sec. 94-7410.

Criminal Intent

Since, to constitute the crime of larceny there must have been a criminal intent to permanently deprive the owner of the property taken, evidence showing that defendant cashier delivered a Liberty Bond held in trust by his bank for a subscriber, in behalf of his bank, as collateral security to another bank, with the intention that it should be redeemed within a short time, which was done before the information against him for larceny was filed, held insufficient to support a verdict of guilty. *State v. Wallin*, 60 M 332, 341, 199 P 285.

Larceny by Bailee

A partner cannot commit larceny of the funds or property of the partnership of which he is a member; but, until an agreement to form a partnership ripens into a consummation of the agreement, a person who contemplates becoming a partner may become the bailee of his prospective partner, and, if he feloniously appropriates the latter's property to his own use, he may be convicted of larceny as bailee. *State v. Brown*, 38 M 309, 315, 99 P 954.

Where a party let defendant have a check under an agreement that he would use the proceeds in his own business for cashing miners' pay checks and repay the amount on a certain day, the transaction amounted to a loan for exchange and title to the money was transferred to the bor-

rower, the loan to be repaid at some future time. The appropriation of it by the defendant, therefore, to a use other than that for which it was advanced did not render him liable to a prosecution for larceny as bailee under subdivision 2 of this section. *State v. Karri*, 51 M 157, 162, 149 P 956.

Where the legal title to a bond was in a bank as trustee and in the possession of it in the cashier only by virtue of his office, a prosecution against the latter under subdivision 2 of this section, under a charge of larceny by bailee, could not be maintained. *State v. Wallin*, 60 M 332, 341, 199 P 285.

Larceny by Bailee Distinguished Between Offense of Officers Neglecting to Pay Over Money

Where the evidence was insufficient to support a conviction under the charge of larceny by bailee provided for by this section, which makes the appropriation and intent the necessary elements, it would have been sufficient under section 94-1502, under which appropriation to one's own use with the intent to deprive the state of its property need not be shown. *State v. McGuire*, 107 M 341, 346, 88 P 2d 35.

Larceny or Embezzlement—What Constitutes

Where the secretary-treasurer of a corporation entered into a contract with his principal to sell unsold treasury stock on a commission to be paid only when cash for the stock had been received, and he made fictitious sales, forged notes given in payment, manipulated the books so as to show him entitled to commissions and drew checks against the corporation's account for such commissions although not earned, converting the money to his own use, he violated his duty to his employer, which violation amounted to larceny or embezzlement within the meaning of this section, and his acts constituted a breach of defendant surety company's bond insuring the employer against such acts. *Montana A. F. Corp. v. Federal Surety Co.*, 85 M 149, 162, 278 P 116.

Owner Must Have Been Deprived of Title as Well as Possession to Constitute Larceny

To convict under this section it is necessary to prove that the defendant obtained the money or property in question under circumstances showing that the owner parted with the title thereto, and not merely with the possession thereof. *State v. Dickinson*, 21 M 595, 55 P 539.

Proof of Ownership—Sufficiency

While the ownership of property (live-stock) charged to have been stolen must be alleged, its particular ownership is not of the essence of the crime, the allegation in this behalf being merely a matter of description which does not give character to the act, and the same strictness of proof is not required as in the proof of material facts. *State v. Grimsley*, 96 M 327, 330, 30 P 2d 85.

Id. In a prosecution for the larceny of calves, allegedly owned by a partnership, evidence, though falling short of technical proof that the two owners were partners, held sufficient to warrant a finding by the jury that the animals were partnership property.

Receiving Stolen Property

While one who steals property is not an accomplice of one who receives it knowing it to have been stolen, the two offenses constituting distinct crimes, where the thief and the receiver conspire together in advance of the larceny for one to steal and the other to receive, they are principals, and each is an accomplice of the other. *State v. Keithley*, 83 M 177, 181, 271 P 452.

Although, under the facts stated, defendant, who it appeared, advised and encouraged the theft of a calf, under section 94-204 was an accomplice or accessory before the fact and therefore a principal to the actual theft under section 94-6423, abrogating the distinction, and by legal fiction had constructive possession, but since he later obtained physical possession, the state may elect to prosecute him for receiving stolen property and his contention that he cannot receive from himself the thing he has stolen is illogically basing further fiction upon fiction, implying that it is impossible to receive actual physical possession as distinguished from constructive possession. *State v. Webber*, 112 M 284, 301, 116 P 2d 679.

Stock Is Subject of Larceny

Shares of corporate stock are property and the subject of larceny. *State v. Leterman*, 88 M 244, 254, 292 P 717.

Sufficiency of the Information or Indictment

The ownership of property is not of the essence of the crime of larceny under this section, which abolishes the distinction recognized at common law between cases where the possession had been unlawfully obtained and those where the possession had been lawful, and an information is not bad for duplicity where it charges that the defendant had money in his possession

as agent of three persons which he appropriated to his own use. *State v. Mjelde*, 29 M 490, 75 P 87.

An indictment charging defendant with larceny as bailee in the words of the statute, and in the form prescribed by section 94-6404, was sufficient, and not open to the objection that it failed to describe the character of the bailment. *State v. Brown*, 38 M 309, 312, 99 P 954.

Id. An indictment charging the defendant with larceny as bailee must contain an averment of the bailment, but the particulars of the bailment need not be averred.

Defendant was charged with the larceny (common theft) of a certificate of building and loan stock. The theory of the prosecution in making its case was that the theft was accomplished by means of deceit and artifice, and the evidence showed that the complaining witness knowingly parted with title to the certificate in making a new investment in a corporation in the conduct of which defendant was shown to have been guilty of fraud and bad faith. He was convicted of the crime as charged. Held, that the conviction was illegal because of the fatal variance between the crime charged and the proof offered in support thereof, entitling defendant to his discharge. *State v. Lund*, 93 M 169, 18 P 2d 603.

Information charging defendant, president of a brokerage firm, with larceny as bailee of a sum of money, couched substantially in the language of subdivision 2 of this section, was sufficient and not vulnerable to a general demurrer. *State v. Lake*, 99 M 128, 136, 43 P 2d 627.

Term "Feloniously" or its Equivalent Is Essential

In a prosecution for the crime of grand larceny a charge to the jury which omits the terms "feloniously," or any other equivalent words which would indicate to the jury that in larceny a felonious intent is necessary to authorize a conviction, constitutes reversible error. *State v. Rechnitz*, 20 M 488, 52 P 264.

An information charging the defendant with grand larceny, in that he "willfully, unlawfully, and feloniously, and with the intent then and there to steal, did take, steal, carry, and drive away" a certain mare and colt, is not open to the objection that it fails to allege that the taking was done with felonious intent—since the term "feloniously" imports criminal intent—but is sufficient both under the common law and under this section and section 94-2704. *State v. Allen*, 34 M 403, 406, 87 P 177.

Where, in a prosecution for grand larceny, the court gave a definition of "larceny" in the language of this section, and further charged the jury that in every

crime or public offense there must exist a union or joint operation of act and intent, and that to find defendant guilty it was sufficient to show that he had appropriated the property mentioned in the information "without color of right or authority," the instructions were erroneous, for the reason that they omitted the element of felonious or criminal intent. *State v. Peterson*, 36 M 109, 110, 92 P 302.

References

Cited or applied as section 8642, Revised Codes, in *State v. Van*, 44 M 374, 384, 120 P 479; *State v. Biggs*, 45 M 400, 123 P 410; *State v. Thomas*, 46 M 468, 128 P 588; *State v. Wiley*, 53 M 383, 386, 164 P 84; *State v. Mercer*, 114 M 142, 156, 133 P 2d 358.

LarcenyⒸ1.

36 C.J. Larceny § 2.

94-2702. (11369) Uttering fraudulent checks or drafts—evidence. Any person who, with intent to defraud, shall make or draw or utter or deliver any check, draft, or order for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or depository for the payment of such check, draft, or order, although no especial representation is made in reference thereto, shall be guilty of a misdemeanor, if said check, draft, or order is for the sum of fifty dollars or less; and if said check, draft, or order is for more than fifty dollars, shall be deemed a felony and punished as provided for in section 94-2706, for grand larceny. In any prosecution under this section as against the maker, or drawer thereof, the making, drawing, uttering, or delivering of a check, draft, or order, payment of which is refused by the drawee because of lack of funds or credit, shall be prima facie evidence of intent to defraud and all knowledge of insufficient funds in or credit with such bank or depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, within five days after receiving notice that such check, draft, or order has not been paid by the drawee. The word "credit" as used herein shall be construed to mean an arrangement or an understanding with the bank or depository for payment of such check, draft, or order.

History: En. Sec. 381, Pen. C. 1895; re-en. Sec. 8643, Rev. C. 1907; amd. Sec. 1, Ch. 63, L. 1919; re-en. Sec. 11369, R. C. M. 1921. Cal. Pen. C. Sec. 476a.

Evidence Insufficient to Convict

Defendant was convicted of uttering a fraudulent check. The check was post-dated and at the time it was given to the complaining witness he was advised by defendant that he did not then have sufficient funds in the bank on which it was drawn (located outside the state) but that by the time it was received by the bank it would be all right. Held, that the gist of the offense charged under this section being fraudulent intent, the evidence was insufficient to show such intent and that the representation made was more in the nature of a future promise than that of

a misrepresentation of an existing fact and therefore did not warrant conviction. *State v. Patterson*, 75 M 315, 316, 243 P 355.

Held, that the charge of grand larceny against an attorney committed in issuing worthless checks, claimed by him to have been given without consideration, while intoxicated and to enable him to engage in a gambling game, was not supported by the evidence, as found by the referee. In re *McCue*, 80 M 537, 553, 261 P 341.

References

Hawaiian Pineapple Co. v. Browne, 69 M 140, 147, 220 P 1114; In re *McCue*, 77 M 47, 53, 248 P 187.

False PretensesⒸ6.

35 C.J.S. False Pretenses §§ 4, 20, 21.

94-2703. (11370) Grand and petit larceny. Larceny is divided into two degrees, the first of which is termed grand larceny, the second petit larceny.

History: En. Sec. 882, Pen. C. 1895; re-en. Sec. 8644, Rev. C. 1907; re-en. Sec. 11370, R. C. M. 1921. Cal. Pen. C. Sec. 486.

Codes, in State v. Wiley, 53 M 383, 386, 164 P 84.

References

Cited or applied as section 8644, Revised

Larceny—23.

36 C.J. Larceny § 224 et seq.

94-2704. (11371) **Grand larceny defined.** Grand larceny is larceny committed with a felonious intent in either of the following cases:

1. When the property taken is of value exceeding fifty dollars.
2. When the property taken is from the person of another.
3. When the property taken is a stallion, mare, gelding, colt, foal, or filly, cow, steer, bull, stag, heifer, calf, mule, jack, jenny, goat, sheep, or hog.
4. If any person or persons shall steal, or with intent to steal shall take, carry, drive, lead, or entice away any mare, gelding, stallion, colt, foal, or filly, mule, jack or jenny, ox, cow, bull, stag, heifer, steer, calf, sheep, goat, or hog, being the property of another, he or they shall be deemed guilty of grand larceny; and shall be liable to the person or persons whose property is stolen for the said property or the value thereof, and for any expenses by him or them incurred in endeavoring to make reclamation thereof.

History: Ap. p. Sec. 883, Pen. C. 1895; en. Sec. 1, p. 247, L. 1897; re-en. Sec. 8645, Rev. C. 1907; amd. Sec. 1, Ch. 57, L. 1921; re-en. Sec. 11371, R. C. M. 1921. Cal. Pen. C. Sec. 487.

Instructions

In a prosecution for larceny of sheep, in which defendant contended that the animals were taken with the consent of the owner and that he had been illegally entrapped, instructions on questions of consent and entrapment, held sufficient to state the law of the case. State v. Snider, 111 M 310, 312, 111 P 2d 1047.

Under subdivision 2, the taking of property from the person of another constitutes grand larceny irrespective of the amount taken; therefore, an offered instruction that, if money charged to have been taken was less than \$50, defendants could only be found guilty of petit larceny was properly refused. State v. Fisher, 108 M 68, 77, 88 P 2d 53.

Instruction that if the jury should find that a cow allegedly stolen was the property of the prosecuting witness, and "if there is no evidence of ownership in any other person" they could conclude that the ownership remained in him, held not open to objection that it assumed that there was no other evidence as to ownership, etc., the court, by the quoted words, having expressly recognized the possibility of the existence of other evidence. Instructions, taken as a whole, sufficient on the subject. State v. Rossell, 113 M 457, 462, 127 P 2d 379.

Ownership Not Essence of Crime—Different Brands

Though ownership must be shown so that defendant may protect himself against another prosecution for the same offense, it is merely a matter of description and not the essence of the crime; the crime is against the state, not the owner or ownership; where the owner and two others testify to ownership, the presence of two unvented brands besides the recorded brand does not result in failure of proof of ownership, unrecorded brands are descriptive as any other identifying marks. State v. Akers, 106 M 43, 51, 53, 74 P 2d 1138.

Evidence of Horse in Foreign State Admissible

Where defendant was one of several men who had entered into a concerted plan to steal horses and ship them out of the state for sale, evidence as to the presence of animal in state to which shipped, was admissible as a link in the chain, or as part of the res gestae relating to larcenous intent in the transaction. State v. Akers, 106 M 43, 54, 74 P 2d 1138.

Refers to Live Animals

As this section refers to live animals only, defendants, who were charged with stealing certain heifers, the carcasses of which, dressed for beef, were found concealed on the range, could be convicted only upon evidence showing beyond a reasonable doubt that they killed, or took

part in killing, the animals. *State v. Keeland*, 39 M 506, 512, 104 P 513.

Sufficiency of Information

An information, alleging that accused did take, steal, drive, lead, and entice away one steer, the property of a person named, with a felonious intent on the part of the accused to deprive the true owner thereof, and to steal the same, charges "grand larceny," as defined by subdivision 4 of this section. *State v. Biggs*, 45 M 400, 402, 123 P 410.

An information charging that defendant stole a "horse" is a sufficient charge of grand larceny under this section. *State v. Collins*, 53 M 213, 163 P 102.

Value of Animal Stolen Immaterial

Under this section, the value of a cow alleged to have been stolen is not a matter in issue; therefore refusal to permit a witness to be cross-examined as to the value of the animal was not an abuse of discretion. *State v. McClain et al.*, 76 M 351, 357, 246 P 956.

Under this section, the stealing of a calf is made grand larceny, regardless of its value, and therefore the jury in such a case are not required to make a finding in their verdict as to the value of the animal stolen. *State v. Ingersoll*, 88 M 126, 131, 292 P 250.

Value of Several Articles May be Aggregated to Charge Grand Larceny

Where the larceny is of several different articles, taken in substantially the same transaction, their value may be aggregated, in order to make out a charge of grand larceny. In *re Jones*, 46 M 122, 125, 126 P 929.

Value When Material

The other elements of the crime of larceny being proven, if the property stolen is shown beyond a reasonable doubt to be of value, the amount of the value is material only in determining the degree of which defendant is guilty; and where there was testimony that stolen articles were of substantial value, the evidence was sufficient to sustain a verdict of guilty of petit larceny—the taking of a thing of the value of fifty dollars or less. *State v. Dimond*, 82 M 110, 114, 265 P 5.

References

Cited or applied as section 8645, Revised Codes, in *State v. Van*, 44 M 374, 384, 120 P 479; *State v. Wiley*, 53 M 383, 386, 164 P 84.

32 Am. Jur. 886, Larceny, §§ 3, 4.

Married woman's criminal responsibility for stealing from husband. 4 ALR 282.

Embezzlement and larceny distinguished. 11 ALR 801 and 146 ALR 532.

Intent to convert property to one's own use or to the use of third person as element of larceny. 12 ALR 804.

Larceny as affected by purpose to take or retain property in payment of or as security for, a claim. 13 ALR 142.

Larceny by appropriating money or proceeds of paper mistakenly delivered in excess of the amount due or intended. 14 ALR 894.

Purchase of property on credit without intending to pay for it as larceny. 35 ALR 1326.

Larceny by finder of property. 36 ALR 372.

Criterion of value for purpose of fixing degree of larceny of automobile license plates. 48 ALR 1167.

Larceny by one spouse of other's property. 55 ALR 558.

Unauthorized use of another property by one lawfully in possession thereof as larceny. 62 ALR 354.

Acceptance of defendant's note or other contractual obligation as affecting charge of larceny. 70 ALR 208.

Appropriation or removal without payment of property delivered in expectation of cash payment. 83 ALR 441.

Larceny of real property or things saving of real property. 131 ALR 146.

Single or separate larceny predicated upon a series of acts over a period of time. 136 ALR 948.

May accessory to larceny be convicted of receiving or concealing the stolen property. 136 ALR 1087.

Knowledge imputed to reasonable man as test of knowledge of defendant in prosecution for larceny or receiving stolen property. 147 ALR 1058.

Charge of larceny or receiving stolen goods predicated upon taking or appropriation of waste paper or other articles deposited in street with intention to donate to patriotic or other cause. 156 ALR 631.

Person who steals property in one state or country and brings it into another as subject to prosecution for larceny in latter. 156 ALR 862.

Fixed or controlled price as affecting value of goods for purpose of determining degree of larceny. 157 ALR 1303.

94-2705. (11372) Petit larceny defined. Larceny in other cases is petit larceny.

History: En. Sec. 884, Pen. C. 1895; re-en. Sec. 8646, Rev. C. 1907; re-en. Sec. 11372, R. C. M. 1921. Cal. Pen. C. Sec. 488.

NOTE.—See annotations under Sec. 94-2704.

Operation and Effect

Where there are two or more distinct larcenies, the general rule is that they cannot be aggregated so as to make the value of the property stolen sufficient to constitute grand larceny, where the value of the property taken at any one time was not sufficient for that purpose. But there is an exception to this rule, that though the larceny is of several different articles, if

they are taken in substantially the same transaction, their value may be aggregated, in order to make out a charge of grand larceny. In re Jones, 46 M 122, 125, 126 P 929.

The other elements of the crime of larceny being proven, if the property stolen is shown beyond a reasonable doubt to be of value, the amount of the value is material only in determining the degree of which defendant is guilty; and where there was testimony that stolen articles were of substantial value, the evidence was sufficient to sustain a verdict of guilty of petit larceny—the taking of a thing of the value of fifty dollars or less. State v. Dimond, 82 M 110, 114, 265 P 5.

94-2706. (11373) Punishment of grand larceny. Grand larceny is punishable by imprisonment in the state prison for not less than one nor more than fourteen years.

History: En. Sec. 885, Pen. C. 1895; re-en. Sec. 8647, Rev. C. 1907; re-en. Sec. 11373, R. C. M. 1921. Cal. Pen. C. Sec. 489.

Operation and Effect

Grand larceny and petit larceny are but two separate degrees of the crime of larceny; there is no punishment prescribed for larceny as such, but the degree of punishment is made to depend upon the de-

gree of the crime. State v. Wiley, 53 M 383, 386, 164 P 84.

References

Cited or applied as section 885, Penal Code, in State v. De Wolfe, 29 M 415, 424, 74 P 1084.

Larceny—88.

36 C.J. Larceny § 581.

94-2707. (11374) Punishment of petit larceny. Petit larceny is punishable by fine not exceeding five hundred dollars or by imprisonment in the county jail not exceeding six months, or both.

History: En. Sec. 886, Pen. C. 1895; re-en. Sec. 8648, Rev. C. 1907; re-en. Sec. 11374, R. C. M. 1921. Cal. Pen. C. Sec. 490.

References

Cited or applied as section 8648, Revised Codes, in State v. Wiley, 53 M 383, 386, 164 P 84.

94-2708. (11375) Dogs, property. Dogs are personal property, and their value is to be ascertained in the same manner as the value of other property.

History: En. Sec. 887, Pen. C. 1895; re-en. Sec. 8649, Rev. C. 1907; re-en. Sec. 11375, R. C. M. 1921. Cal. Pen. C. Sec. 491.

Larceny—5.

38 C.J. Marshaling Assets and Securities § 18.

32 Am. Jur. 992, Larceny, § 79.

Cats as subject of larceny. 33 ALR 796.

Dogs as subject of larceny. 92 ALR 212.

94-2709. (11376) Larceny of lost property. One who finds lost property under circumstances which give him knowledge of or means of inquiry as to the real owner and who appropriates such property to his own use or to the use of another person not entitled thereto, without first making reasonable and just efforts to find the owner and restore the property to him, is guilty of larceny.

History: En. Sec. 888, Pen. C. 1895; re-en. Sec. 8650, Rev. C. 1907; re-en. Sec. 11376, R. C. M. 1921. Cal. Pen. C. Sec. 485.

Larceny—10.

36 C.J. Larceny § 82.

32 Am. Jur. 987, Larceny, § 77.

Larceny by finder of property. 36 ALR 372.

94-2710. (11377) Larceny of written instruments. If the thing stolen consists of any evidence of debt or other written instrument the amount of money due thereon or secured to be paid thereby and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property, the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen.

History: En. Sec. 889, Pen. C. 1895; re-en. Sec. 8651, Rev. C. 1907; re-en. Sec. 11377, R. C. M. 1921. Cal. Pen. C. Sec. 492.

Operation and Effect

An instruction in a prosecution for the larceny of promissory notes that the amount of money due on the notes or secured to be paid thereby and remaining unsatisfied was their value, was correct under this section, and one offered by defendant to the effect that evidence relat-

ing to the instrument should be disregarded because it has not been shown that they had any value was properly refused, where one of the notes was introduced in evidence and the value of the other was shown by books of account, thus making out a prima facie case for the state. State v. Cassill et al., 71 M 274, 279, 229 P 716.

Larceny—6.

36 C.J. Larceny § 27.

94-2711. (11378) Value of passage tickets. If the thing stolen is any ticket or other paper or writing entitling or purporting to entitle the holder or proprietor thereof to a passage upon any railroad or vessel, or other public conveyance, the price at which tickets entitling a person to a like passage are usually sold by the proprietors of such conveyance is the value of such ticket, paper, or writing.

History: En. Sec. 890, Pen. C. 1895; re-en. Sec. 8652, Rev. C. 1907; re-en. Sec. 11378, R. C. M. 1921. Cal. Pen. C. Sec. 493.

Larceny—6.

36 C.J. Larceny § 35.

94-2712. (11379) Written instruments completed but not delivered. All the provisions of this chapter apply where the property taken is an instrument for the payment of money, evidence of debt, public security, or passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the makers thereof to any person as a purchaser or owner.

History: En. Sec. 891, Pen. C. 1895; re-en. Sec. 8653, Rev. C. 1907; re-en. Sec. 11379, R. C. M. 1921. Cal. Pen. C. Sec. 494.

Larceny—5.

36 C.J. Larceny § 27 et seq.

94-2713. (11380) Severing and removing part of the realty. The provisions of this chapter apply where the thing taken is a fixture or part of the realty, and is severed at the time of the taking, in the same manner as if the thing had been severed by another person at some previous time.

History: En. Sec. 892, Pen. C. 1895; re-en. Sec. 8654, Rev. C. 1907; re-en. Sec. 11380, R. C. M. 1921. Cal. Pen. C. Sec. 495.

Larceny—5.

36 C.J. Larceny § 23.

32 Am. Jur. 999, Larceny, §§ 83, 84.

Larceny of real property or things sav-
oring of real property. 131 ALR 146.

94-2714. (11381) Larceny and receiving stolen property out of the state. Every person who, in another state or country, steals the property of another, or receives such property knowing it to have been stolen, and brings the same into this state, may be convicted and punished in the same manner as if such larceny or receiving had been committed in this state.

History: En. Sec. 893, Pen. C. 1895; re-en. Sec. 8655, Rev. C. 1907; re-en. Sec. 11381, R. C. M. 1921. Cal. Pen. C. Sec. 497.

Operation and Effect

In a prosecution under this section, the information need not allege when and where the taking actually occurred, such matters being evidentiary and open to proof without specific allegation; the charge is sufficient if it be the same in form as for a larceny committed in this state. *State v. Willette*, 46 M 326, 328, 127 P 1013.

Criminal Law 97 (1).

22 C.J.S. Criminal Law § 134.

See generally, 45 Am. Jur. 383, Receiving Stolen Property.

Wife's criminal responsibility for receiving stolen goods from husband. 4 ALR 281.

Entrapment to commit crime of receiving stolen property. 18 ALR 187.

May accessory to larceny be convicted of receiving or concealing the stolen property. 136 ALR 1087.

Knowledge imputed to reasonable man as test of knowledge of defendant in prosecution for receiving stolen property. 147 ALR 1058.

94-2715. (11382) Conversion by trustee, larceny. Every person acting as executor, administrator, guardian, receiver, the officer of any bank or corporation, or trustee of any description appointed by a deed, will, or other instrument, or by an order or judgment of a court, judge, or officer, who secretes, withholds, or otherwise appropriates to his own use, or that of any person other than the true owner, or person entitled thereto, any money, goods, thing in action, security, evidence of debt or property, or other valuable thing, or any proceeds thereof, in his possession or custody, by virtue of his office, employment, or appointment, is guilty of larceny in such degree as is herein prescribed with reference to the value of such property.

History: En. Sec. 894, Pen. C. 1895; re-en. Sec. 8656, Rev. C. 1907; re-en. Sec. 11382, R. C. M. 1921.

Operation and Effect

Where a guardian, who had given ample security to account for all funds coming into his hands as such, and who was personally able to raise the amount thereof on demand, under a misapprehension that he had a right to do so, temporarily employed guardianship funds to repay a loan, thus technically appropriating them to his own use, he nevertheless could not be adjudged guilty of larceny under this section, especially where, at the settlement of the estate, he fully accounted for all moneys paid over to him as guardian. *Smith v. Smith*, 45 M 535, 580, 125 P 987.

An information charging that, while acting as cashier of a bank, defendant feloniously converted a Liberty Bond to his own use, was insufficient for failure to allege

that the bond came into his possession by virtue of his office. *State v. Wallin*, 60 M 332, 339, 199 P 285.

Defendant, a bank officer, whose personal account with the bank was overdrawn, drew a draft on another bank and credited his account with the amount thereof; the draft was returned unpaid and he then charged it to the account of one of the bank's depositors. No actual money was taken and the cash account of the bank was not diminished. Held, that while defendant may have been guilty of falsifying the books of the bank or of misapplication of a credit belonging to another his act did not constitute larceny from the bank as charged in the information. *State v. Rarey*, 72 M 270, 275, 233 P 615.

Larceny 15.

36 C.J. Larceny §§ 165 et seq., 183 et seq.

94-2716. (11383) Verbal false pretense, not larceny. A purchase of property by means of false pretense is not criminal where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged.

History: En. Sec. 895, Pen. C. 1895; re-en. Sec. 8657, Rev. C. 1907; re-en. Sec. 11383, R. C. M. 1921.

Cross-Reference

Obtaining money by false pretenses as larceny, sec. 94-1805.

False Pretenses 7 (5).

35 C.J.S. False Pretenses §§ 4, 9, 10, 14.

94-2717. (11384) **Claim of title, ground of defense.** Upon an indictment, information or complaint for larceny it is a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though such claim is untenable. The fact that the defendant intended to restore the property taken is no ground of defense if it has not been restored before complaint, to a magistrate or court, charging the commission of the offense, has been made.

History: En. Sec. 896, Pen. C. 1895; State v. Letterman, 88 M 245, 255, 292 re-en. Sec. 8658, Rev. C. 1907; re-en. Sec. 11384, R. C. M. 1921.

Operation and Effect

Though in a prosecution for larceny, appropriation by defendant of the property in question openly and under a claim of title preferred in good faith is, under this section, a sufficient defense, it lies within the jury's province to say whether or not he established the defense by his evidence.

References

Cited or applied as section 8658, Revised Codes, in State v. Blaine, 45 M 482, 487, 124 P 516; State v. Wallin, 60 M 332, 341, 199 P 285; State v. Cassill et al., 71 M 274, 281, 229 P 716.

Larceny § 3 (3).

36 C.J. Larceny § 105 et seq.

94-2718. (11385) **Larceny of gas or electricity.** Every person who, with intent to injure or defraud, procures, makes, or causes to be made, any pipe, tube, wire, or other conductor of gas or electricity, and connects the same, or causes it to be connected, with any main, service-pipe, or other pipe for conducting or supplying illuminating gas or any wires or other conductor of electricity, in such manner as to supply illuminating gas or electricity to any lamp, motor, burner, or orifice, by or at which illuminating gas or electricity is consumed, around or without passing through the meter provided for the measuring and registering the quantity consumed, or in any other manner so as to evade payment therefor, and every person who, with like intent, injures or alters any gas or electric meter, or obstructs its action, is guilty of a misdemeanor. In prosecutions for offenses under this section, proof that any of the acts herein forbidden have been done in, upon, or about the premises owned or used by the defendant charged with the commission of such offense in such a manner as to decrease or lessen the amount he should pay under his understanding or contract with any person or corporation engaged in the business of furnishing and selling gas or electricity, shall be prima facie evidence of the guilt of said defendant.

History: Ap. p. Sec. 897, Pen. C. 1895; en. Sec. 1, p. 248, L. 1897; re-en. Sec. 8659, Rev. C. 1907; re-en. Sec. 11385, R. C. M. 1921. Cal. Pen. C. Secs. 498 and 499a.

E. & P. Co., 43 M 118, 115 P 44; Clifford v. Great Falls Gas Co., 68 M 300, 305, 216 P 1114.

References

Cited or applied as section 8659, Revised Codes, in State ex rel. Deeny v. Butte

32 Am. Jur. 1002, Larceny, §§ 85 et seq. Successive takings of electrical energy, gas, water, heat, power, etc., as a single offense. 113 ALR 1286.

94-2719. (11386) **Larceny of water, gas and electricity.** Every person who, with intent to injure or defraud, connects or causes to be connected, any pipe, tube, wire, electrical conductor or other instrument with any main, service-pipe, or other pipe or conduit or flume for conducting water, or with any main, service-pipe, or other pipe or conduit for conducting gas, or with any main service wires or other electrical conductor used for the purpose of conducting electricity for light or motive service, for the purpose of taking therefrom water, gas, or electricity without the knowledge of the owner

thereof and with intent to evade payment therefor, is guilty of a misdemeanor. In prosecutions for offenses under this section proof that any of the acts herein forbidden have been done in, upon, or about the premises owned or used by the defendant charged with the commission of such offense in such a manner as to provide for such defendant's use, water, gas or electricity shall be prima facie evidence of the guilt of the defendant.

History: Ap. p. Sec. 898, Pen. C. 1895; Electricity 21; Gas 23; Waters and en. Sec. 2, p. 248, L. 1897; re-en. Sec. 8660, Water Courses 212.
Rev. C. 1907; re-en. Sec. 11386, R. C. M. 29 C.J.S. Electricity §§ 76, 77; 38 C.J.S. 1921. Cal. Pen. C. Sec. 499. Gas § 5.

94-2720. (11387) False device for measuring gas, water or electricity. Every person or persons, or officer or officers, or employee or employees of any corporation or corporations who with intent to injure, or defraud, uses or causes to be used any false registering or false measuring device or meter for the measuring of any water, gas or electric current that is sold to any other person or persons, corporation or corporations, or who shall alter or change the record or measurement of any such meter or measuring device with intent to injure or defraud, shall be guilty of a misdemeanor and on conviction thereof shall be fined in the sum of not less than one hundred dollars nor more than five hundred dollars. In prosecutions for offenses under this section, proof of the use of such false registering meter or proof of an attempt to collect payment from any consumer for any falsified amount or quantity of gas, water, or electricity, shall be prima facie evidence of the guilt of such defendant.

History: En. Sec. 900, p. 249, L. 1897; re-en. Sec. 8661, Rev. C. 1907; re-en. Sec. 11387, R. C. M. 1921.

94-2721. (11388) Receiver of stolen property. Every person who for his own gain or to prevent the owner from again possessing his own property buys or receives any personal property, knowing the same to have been stolen, is punishable by imprisonment in the state prison not exceeding five (5) years or in a county jail not exceeding six (6) months; and it is presumptive evidence that such property was stolen if the same consists of jewelry, silver or plated ware or articles of personal ornaments, brass, bronze or copper fixtures, fittings or parts of machinery, or electrical supplies, or what is commonly termed junk, if purchased or received from a person under the age of twenty-one (21) years unless said property is sold by said minor at a fixed place of business carried on by said minor or his employer.

The jurisdiction of a criminal action for receiving stolen property is in any county wherein said property was received or into or through which such stolen property has been brought.

History: En. Sec. 899, Pen. C. 1895; re-en. Sec. 8662, Rev. C. 1907; amd. Sec. 1, Ch. 137, L. 1915; re-en. Sec. 11388, R. C. M. 1921; amd. Sec. 1, Ch. 30, L. 1931. Cal. Pen. C. Sec. 496.

Cross-Reference

Disposition of stolen property, secs. 94-9701 to 94-9707.

Confusing Prior Knowledge with Aiding or Abetting

The mere knowledge in a person that a crime is about to be committed does not constitute him an accomplice; nor does the fact that one charged with receiving stolen property, on prior occasions may have purchased such property seem sufficient to make the receiver an accomplice in the

particular theft nor even to give him the knowledge that it was to be committed. *State v. Mercer*, 114 M 142, 149, 133 P 2d 358.

Effect of Statutory Presumption When Receiving Property from Minor

Under the provision of this section, declaring that where a person buys or receives any of the articles specifically enumerated therein from a minor other than at a fixed place of business carried on by the minor or his employer, it shall be presumptive evidence that the property was stolen, it is also to be presumed that the person bought or received it knowing it to be stolen, the rule applying to him at the time of its purchase or reception as well as upon his trial. *State v. Sim*, 92 M 541, 547, 16 P 2d 411.

Id. In a prosecution against the owner of a garage for buying radiator cores, coils of copper tubing, etc., from a minor at his, defendant's, place of business, which articles had been stolen by the boy from his father's automobile repair-shop, held, that in the absence of evidence on defendant's part to overcome the presumption adverted to in the preceding paragraph, the jury was justified in finding that defendant, bound, as he was, to know the law as declared by this section, knew when he purchased the articles that they were stolen.

Essential Elements of Crime

To make out the offense covered by this section, the evidence must establish that the property in question was stolen; that the defendant bought it or received it knowing it to have been stolen; and that he did so for his own gain, or to prevent the owner from regaining possession of it. *State v. Moxley*, 41 M 402, 407, 110 P 83.

To make out the offense of buying or receiving stolen property under this section, the state's evidence must establish that the property was stolen, that the defendant bought or received it knowing it was stolen, and that he did so for his own gain or to prevent the owner from regaining possession of it. *State v. Sim*, 92 M 541, 547, 16 P 2d 411.

In a prosecution for receiving stolen property, a distinct statutory offense, guilty knowledge on the part of the defendant that the property was stolen when he received it, which involves guilty intent, is essential to the constitution of the crime. *State v. Keays*, 97 M 404, 407 et seq., 34 P 2d 855.

May be Proved by Circumstantial Evidence

The crime of receiving stolen property, knowing it to have been stolen, may be proved by circumstantial evidence. *State v. Moxley*, 41 M 402, 408, 110 P 83.

Ownership Is a Matter of Description

The allegation of ownership in an information charging receiving stolen property, is merely one of description, this section not defining its character, whether general, special, joint or several, and where it was fully proved as being in a partnership in a named city, and there was no suggestion of any danger of defendant's being subjected to another prosecution as that of a different owner, contention that there was failure of proof in that regard is without merit. *State v. Mercer*, 114 M 142, 156, 133 P 2d 358.

Ownership Must be Proven as Alleged

In a prosecution for the crime of receiving stolen property, its ownership must be proved as alleged; hence, where the ownership, as laid in the information, was jointly in three persons named, and the evidence disclosed that most of the articles belonged to one of them, and the remaining ones to the other two individually, there was such a variance as amounted to a failure of proof. *State v. Moxley*, 41 M 402, 408, 110 P 83.

Receiver Not an Accomplice

One who receives stolen property, as did the herder referred to in this case, but not for his own gain or to prevent the owner from regaining possession of it, is not a receiver of stolen property (this section), nor does the fact that one is a receiver of stolen property make him an accomplice of the one committing the larceny. *State v. McComas et al.*, 85 M 428, 434, 278 P 993.

Receiving of Stolen Property and Larceny Separate Crimes

While one who steals property is not an accomplice of one who receives it knowing it to have been stolen, the two offenses constituting distinct crimes, where the thief and the receiver conspire together in advance of the larceny for one to steal and the other to receive, they are principals, and each is an accomplice of the other. *State v. Keithley*, 83 M 177, 180, 182, 271 P 452.

The crime of receiving stolen property defined in this section is a distinct statutory crime, and one who, after the crime of larceny is completed, being present, aids and abets others in receiving the stolen property, with knowledge that it was stolen and with the intent, either for his own gain or to prevent the owner from again possessing the property, is a principal and properly prosecuted as such. *State v. Huffman*, 89 M 194, 201, 296 P 789.

Held, that the conspiracy rule promulgated in *State v. Keithley*, 83 M 177, 271 P 449, being an exception to the rule gen-

erally accepted that he who commits a theft is not the accomplice of him who knowingly receives the stolen property, though correct under the facts of that case, does not make the thief an accomplice of the receiver where the theft was committed before the thief solicited the receiver to buy the property, the latter having had no knowledge of the fact that the theft was to be committed. *State v. Mercer*, 114 M 142, 149, 133 P 2d 358.

Receiving Stolen Property of the U. S. Is a Crime Against the State

Under an information charging the crime of receiving stolen property belonging to the United States, held, on application for writ of habeas corpus based upon the contention that since the property belonged to the federal government, it had exclusive jurisdiction of the offense, that the fact that the offense is also indictable under section 101, Title 18, U. S. C. A., does not oust the state district court of jurisdiction to try defendant under this section, which makes it a crime against the state to receive stolen property regardless of ownership. *Ex parte Groom*, 87 M 377, 379 et seq., 287 P 638.

Sufficiency of Information

As in charging the offense of larceny, so in charging that of receiving stolen property, the information must identify the offense by a description of the things stolen, and state the name of the owner, if known. *State v. Moxley*, 41 M 402, 408, 110 P 83.

Value Immaterial

In an information under this section, value need not be alleged, and proof of some value is enough. The penalty does not depend upon value. *State v. Moxley*, 41 M 402, 409, 110 P 83.

94-2722. (10873) **Larceny, destruction, etc., of records by officers.** Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, wilfully destroying, mutilating, defacing, altering, or falsifying, removing, or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person so to do, is punishable by imprisonment in the state prison not less than one nor more than fourteen years.

History: En. Sec. 230, Pen. C. 1895; re-en. Sec. 8229, Rev. C. 1907; re-en. Sec. 10873, R. C. M. 1921. Cal. Pen. C. Sec. 113.

Operation and Effect

An indictment under this section, for wilfully secreting a public record, need not allege an intent to injure any particular person, in view of section 10713 (since repealed) providing that an act may be done "wilfully" without any intent to in-

When Defendant Also Principal in Theft

Although, under the facts stated, defendant, who it appeared, advised and encouraged the theft of a calf, under section 94-204 was an accomplice or accessory before the fact (and therefore a principal to the actual theft under section 94-6423, abrogating the distinction) and by legal fiction had constructive possession, but since he later obtained physical possession from the taker, the state may elect to prosecute him for receiving stolen property, and his contention that he cannot receive from himself the thing he has stolen is illogically basing further fiction upon fiction, implying that it is impossible to receive actual physical possession as distinguished from constructive possession. *State v. Webber*, 112 M 284, 301, 116 P 2d 679.

References

Cited or applied as section 899, Penal Code, in *State v. Rechnitz*, 20 M 488, 494, 52 P 264; *Factor v. Laubenheimer*, 290 U. S. 276, 78 L. ed. 315, 54 Sup. Ct. 191.

Receiving Stolen Goods \S 1.

53 C.J. **Receiving Stolen Goods** \S 2.

See generally, 45 Am. Jur. 383, **Receiving Stolen Property**.

Wife's criminal responsibility for receiving stolen goods from husband. 4 ALR 281.

Entrapment to commit crime of receiving stolen property. 18 ALR 187.

May accessory to larceny be convicted of receiving or concealing the stolen property. 136 ALR 1087.

Knowledge imputed to reasonable man as test of knowledge of defendant in prosecution for receiving stolen property. 147 ALR 1058.

This section refers to mutilating, defacing, or altering books, maps, and other documents which are matters of evidence, and has no reference to the making of a correct index of the contents of any books

in a public office. State ex rel. Coad v. District Court, 23 M 171, 175, 57 P 1095.

Records 21, 22.

53 C.J. Records § 97 et seq.

32 Am. Jur. 990, Larceny, § 77.

94-2723. (10874) Larceny, destruction, etc., of records by others. Every person not an officer such as is referred to in the preceding section, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding one hundred dollars, or both.

History: En. Sec. 231, Pen. C. 1895; 10874, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8230, Rev. C. 1907; re-en. Sec. 114.

94-2724. (10875) Offering forged or false instruments to be recorded. Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within the state, which instrument, if genuine, might be filed, or registered, or recorded under any law of this state, or of the United States, is guilty of felony.

History: En. Sec. 232, Pen. C. 1895; re-en. Sec. 8231, Rev. C. 1907; re-en. Sec. 10875, R. C. M. 1921. Cal. Pen. C. Sec. 115.

Forgery 16.

37 C.J.S. Forgery § 37.

94-2725. (10876) Adding names, etc., to the jury lists. Every person who adds any names to the list of persons selected to serve as jurors for the county, either by placing the same in the jury box or boxes, or otherwise, or extracts any name therefrom, or destroys the jury box or boxes, or any of the pieces of paper containing the names of jurors, or mutilates or defaces such names so that the same cannot be read, or changes such names on the pieces of paper, except in cases allowed by law, is guilty of a felony.

History: En. Sec. 233, Pen. C. 1895; re-en. Sec. 8232, Rev. C. 1907; re-en. Sec. 10876, R. C. M. 1921. Cal. Pen. C. Sec. 116.

46 C.J. Obstructing Justice § 22 et seq. Misconduct of officers in selection of jurors as contempt. 7 ALR 345.

Irregularities in drawing names for panel. 92 ALR 1109.

Obstructing Justice 6.

94-2726. (10877) Falsifying jury lists, etc. Every officer or person required by law to certify to the list of persons selected as jurors, who maliciously, corruptly, or wilfully certifies to a false and incorrect list, or a list containing other names than those selected, or who, being required by law to write down the names placed on the certified lists on separate pieces of paper, does not write down and place in the jury box or boxes, the same names that are on the certified list, and no more and no less than are on such lists, is guilty of a felony.

History: En. Sec. 234, Pen. C. 1895; re-en. Sec. 8233, Rev. C. 1907; re-en. Sec. 117.

10877, R. C. M. 1921. Cal. Pen. C. Sec. 117.

CHAPTER 28

LIBEL

- Section 94-2801. Libel defined.
94-2802. Punishment of libel.
94-2803. Malice presumed.

- 94-2804. Truth may be given in evidence—jury to determine law and fact.
- 94-2805. Publication defined.
- 94-2806. Liability of editors and publishers.
- 94-2807. Publishing a true report of public proceedings privileged.
- 94-2808. Extent of privilege.
- 94-2809. Other privileged communications.
- 94-2810. Threatening to publish libel—offer to prevent publication, with intent to extort money.
- 94-2811. Giving false information for publication.

94-2801. (10989) Libel defined. A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or to publish the natural or alleged defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule.

History: En. Sec. 125, p. 207, Bannack Stat.; re-en. Sec. 139, p. 301, Cod. Stat. 1871; re-en. Sec. 139, 4th Div. Rev. Stat. 1879; re-en. Sec. 154, 4th Div. Comp. Stat. 1887; re-en. Sec. 430, Pen. C. 1895; re-en. Sec. 8325, Rev. C. 1907; re-en. Sec. 10989, R. C. M. 1921. Cal. Pen. C. Sec. 248.

Cross-References

Indictment, sec. 94-6417.
Political criminal libel defined, sec. 94-1454.

False Report on Dissenting Opinion of Jurist

Contemptuous language published by a newspaper concerning a dissenting opinion does not constitute contempt of court, since it is the view of an individual justice and not the opinion of the court, but if the language be libelous, the remedy is a civil or criminal action for libel. In re Nelson et al., 103 M 43, 64, 60 P 2d 365.

Operation and Effect

In determining whether a publication is libelous per se, the language complained of must be construed in its relation to the entire article in which it appears; so construed, held that the statement published in a newspaper that the publisher would "continue to expose all graft and corruption," taken in connection with preceding

assertions that an attachment proceeding had been brought against the paper in revenge for exposing the "dirty work" of plaintiff, a constable, and another, that plaintiff had acted unlawfully in other cases, and that he had formed a collusive partnership with such other person, in effect charged plaintiff with graft in connection with the administration of his office and was, therefore, libelous per se. State v. Winterrowd, 77 M 74, 77, 249 P 664.

Id. The word "graft," when used in connection with the conduct of a public officer, implies sometimes actual theft and always want of integrity, and its use in that respect is actionable per se.

Libel and Slander—141.

37 C.J. Libel and Slander § 633 et seq.
33 Am. Jur. 291, Libel and Slander, §§ 308 et seq.

Entrapment to commit crime of criminal libel. 18 ALR 160.

Character of libel for which criminal prosecution will lie. 19 ALR 1470.

Criminal responsibility for libel of officer. 19 ALR 1489.

Words as criminal offense other than libel or slander. 48 ALR 83.

Libel and slander: privilege as regards publication of judicial opinion. 146 ALR 913.

94-2802. (10990) Punishment of libel. Every person who wilfully, and with a malicious intent to injure another, publishes, or procures to be published, any libel, is punishable by fine not exceeding five thousand dollars, or imprisonment in the county jail not exceeding one year.

History: En. Sec. 431, Pen. C. 1895; re-en. Sec. 8326, Rev. C. 1907; re-en. Sec. 10990, R. C. M. 1921. Cal. Pen. C. Sec. 249.

References

State v. Winterrowd, 77 M 74, 77, 249 P 664.

Libel and Slander—162.

37 C.J. Libel and Slander § 708 et seq.

94-2803. (10991) Malice presumed. An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown.

History: En. Sec. 432, Pen. C. 1895; re-en. Sec. 8327, Rev. C. 1907; re-en. Sec. 10991, R. C. M. 1921. Cal. Pen. C. Sec. 250.

Operation and Effect

Where a publication by a newspaper is libelous per se, the law presumes malice, in the absence of lawful excuse, even though no spite or ill-will be shown. Kelly

v. Independent Publishing Co., 45 M 127, 141, 122 P 735. See also Cooper v. Romney, 49 M 119, 127, 141 P 289.

References

Wray v. Great Falls Paper Co., 72 M 461, 466, 234 P 486.

Libel and Slander—154.
37 C.J. Libel and Slander § 687.

94-2804. (10992) Truth may be given in evidence—jury to determine law and fact. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted. The jury have the right to determine the law and the fact.

History: En. Sec. 433, Pen. C. 1895; re-en. Sec. 8328, Rev. C. 1907; re-en. Sec. 10992, R. C. M. 1921. Cal. Pen. C. Sec. 251.

Libel and Slander—149, 158.
37 C.J. Libel and Slander §§ 646, 704.
33 Am. Jur. 299, Libel and Slander, § 320.

References

State v. Winterrowd, 77 M 74, 79, 249 P 664.

94-2805. (10993) Publication defined. To sustain a charge of publishing a libel, it is not needful that the words or things complained of should have been read or seen by another. It is enough that the accused knowingly parted with the immediate custody of the libel, under circumstances which exposed it to be read or seen by any other person than himself.

History: En. Sec. 434, Pen. C. 1895; re-en. Sec. 8329, Rev. C. 1907; re-en. Sec. 10993, R. C. M. 1921. Cal. Pen. C. Sec. 252.

Libel and Slander—146.
37 C.J. Libel and Slander § 642.

94-2806. (10994) Liability of editors and publishers. Each author, editor, or proprietor of any book, newspaper, or serial publication, is chargeable with the publication of any words contained in any part of such book, or number of such newspaper or serial.

History: En. Sec. 435, Pen. C. 1895; re-en. Sec. 8330, Rev. C. 1907; re-en. Sec. 10994, R. C. M. 1921. Cal. Pen. C. Sec. 253.

Cross-Reference

Liability of radio station operators, secs. 64-205 to 64-207.

Libel and Slander—150.
37 C.J. Libel and Slander § 661.

94-2807. (10995) Publishing a true report of public proceedings privileged. No reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument, or debate in the course of the same, except upon proof of malice in making such report, which is not implied from the mere fact of publication.

History: En. Sec. 436, Pen. C. 1895; re-en. Sec. 8331, Rev. C. 1907; re-en. Sec. 10995, R. C. M. 1921. Cal. Pen. C. Sec. 254.

Libel and Slander—148.
37 C.J. Libel and Slander § 647 et seq.
26 Am. Jur. 160, Homicide, §§ 9-31.
Libelous or privileged character of pub-

lication by newspaper based on matters received from news agency or regular correspondent. 86 ALR 475.

Privilege in respect of publications relating to proceedings to disbar or otherwise discipline attorney. 87 ALR 696.

Privilege as to reports of judicial proceedings as attaching to publication of meetings, etc., before hearings. 104 ALR 1124.

Garbled, inaccurate, or mistaken report of judicial proceedings as within privilege. 120 ALR 1236.

94-2808. (10996) Extent of privilege. Libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of their being so connected.

History: En. Sec. 437, Pen. C. 1895; 10996, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8332, Rev. C. 1907; re-en. Sec. 255.

94-2809. (10997) Other privileged communications. A communication made to a person interested in the communication, by any one who was also interested, or who stood in such relation to the former, as to afford a reasonable ground for supposing his motive innocent, is not presumed to be malicious, and is a privileged communication.

History: En. Sec. 438, Pen. C. 1895; re-en. Sec. 8333, Rev. C. 1907; re-en. Sec. 10997, R. C. M. 1921. Cal. Pen. C. Sec. 256.

Privilege of statement or communication by official charged with prosecution or detection of crime. 15 ALR 249.

Privilege of communications made to employee regarding conduct of another employee or former employee. 98 ALR 1301.

Doctrine of privilege of fair comment as applicable to misstatements of fact in publication relating to public officer or candidate for office. 110 ALR 412.

Privilege of communications made by private person or concern to public authorities regarding one not in public employment. 136 ALR 543.

Privilege regarding communication to police or other officer respecting commission of crime. 140 ALR 1466.

94-2810. (10998) Threatening to publish libel—offer to prevent publication, with intent to extort money. Every person who threatens another to publish a libel concerning him, or any parent, husband, wife, or child of such person, or member of his family, and every person who offers to prevent the publication of any libel upon another person, with intent to extort money or other valuable consideration from any person, is guilty of a misdemeanor.

History: En. Sec. 439, Pen. C. 1895; re-en. Sec. 8334, Rev. C. 1907; re-en. Sec. 10998, R. C. M. 1921. Cal. Pen. C. Sec. 257.

Threats[Ⓒ]1 (1).

62 C.J. Threats and Unlawful Communications § 3 et seq.

94-2811. (10999) Giving false information for publication. Any person who wilfully states, delivers, or transmits, by any means whatsoever, to the manager, editor, publisher, or reporter of any newspaper, magazine, publication, periodical, or serial, for publication therein, any false or libelous statement concerning any person or corporation, and thereby secures the actual publication of the same, is hereby declared guilty of a misdemeanor, and, upon conviction, shall be sentenced to pay a fine not exceeding five hundred dollars, or confined in the county jail not exceeding six months, or both.

History: En. Sec. 1, Ch. 36, L. 1905; re-en. Sec. 8335, Rev. C. 1907; re-en. Sec. 10999, R. C. M. 1921.

Libel and Slander[Ⓒ]147.

37 C.J. Libel and Slander § 667.

CHAPTER 29

LEGISLATURE—OFFENSES AGAINST

- Section 94-2901. Preventing the meeting or organization of legislative assembly.
 94-2902. Disturbing the legislative assembly while in session.
 94-2903. Altering draft of bill or resolution.
 94-2904. Altering engrossed or enrolled copy of bill or resolution.
 94-2905. Giving or offering bribes to members of the legislative assembly.
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 94-2907. Solicitation of bribes.
 94-2908. Bribery of members of legislative assembly.
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 94-2915. Bribery and solicitation of bribery by member of legislature.
 94-2916. Bribery of member of legislature.
 94-2917. Acts constituting bribery.
 94-2918. Same.
 94-2919. Penalties for violation of act.

94-2901. (10834) Preventing the meeting or organization of legislative assembly. Every person who wilfully, and by force and fraud, prevents the legislative assembly of this state or either of the houses composing it, or any of the members thereof, from meeting or organizing, is guilty of felony.

History: En. Sec. 160, Pen. C. 1895; Disturbance of Public Assemblage—1.
 re-en. Sec. 8190, Rev. C. 1907; re-en. Sec. 27 C.J.S. Disturbance of Public Meet-
 10834, R. C. M. 1921. Cal. Pen. C. Sec. 81. ings § 1.

94-2902. (10835) Disturbing the legislative assembly while in session. Every person who wilfully disturbs the legislative assembly of this state, or either of the houses composing it, while in session, or who commits any disorderly conduct in the immediate view and presence of either house, tending to interrupt its proceedings or impair the respect due its authority, is guilty of a misdemeanor.

History: En. Sec. 161, Pen. C. 1895;
 re-en. Sec. 8191, Rev. C. 1907; re-en. Sec.
 10835, R. C. M. 1921. Cal. Pen. C. Sec. 82.

94-2903. (10836) Altering draft of bill or resolution. Every person who fraudulently alters the draft of any bill or resolution which has been presented to either of the houses composing the legislative assembly, to be passed or adopted, with intent to procure it to be passed or adopted by either house, or certified by the presiding officer of either house, in language different from that intended by such house, is guilty of felony.

History: En. Sec. 162, Pen. C. 1895;
 re-en. Sec. 8192, Rev. C. 1907; re-en. Sec.
 10836, R. C. M. 1921. Cal. Pen. C. Sec. 83.

94-2904. (10837) Altering engrossed or enrolled copy of bill or resolution. Every person who fraudulently alters the engrossed copy or enrollment of any bill or resolution which has been passed or adopted by the legislative assembly of this state, with intent to procure it to be approved by the governor, or certified by the secretary of state, or printed or published

by the printer of statutes, in language different from that in which it was passed or adopted by the legislative assembly, is guilty of felony.

History: En. Sec. 163, Pen. C. 1895;
re-en. Sec. 8193, Rev. C. 1907; re-en. Sec.
10837, R. C. M. 1921. Cal. Pen. C. Sec. 84.

94-2905. (10838) Giving or offering bribes to members of the legislative assembly. Every person who gives or offers a bribe to any member of the legislative assembly, or to another person for him, or attempts, by menace, deceit, suppression of truth, or any corrupt means, to influence a member in giving or withholding his vote, or in not attending the house or any committee of which he is a member, is punishable by imprisonment in the state prison not less than one nor more than ten years.

History: En. Sec. 164, Pen. C. 1895;
re-en. Sec. 8194, Rev. C. 1907; re-en. Sec.
10838, R. C. M. 1921. Cal. Pen. C. Sec. 85.

Operation and Effect

Bribery of a member of the legislature is a felony. In re Wellcome, 23 M 140, 145, 58 P 45.

Bribery—1 (2).

11 C.J.S. Bribery §§ 1, 3.

See generally, 8 Am. Jur. 885, Bribery.

Predicating bribery or cognate offense upon unaccepted offer by or to an official. 52 ALR 816.

Criminal offense of bribery as affected by lack of legal qualification of person assuming to be an officer. 115 ALR 1263.

Officer's lack of authority as affecting offense of bribery. 122 ALR 951.

Bribery as affected by nonexistence of duty upon part of official to do, or refrain from doing, the act in respect of which it was sought to influence him. 158 ALR 323.

94-2906. (10839) Receiving bribes by members of the legislative assembly. Every member of either of the houses composing the legislative assembly of this state, who asks, receives, or agrees to receive any bribe, upon any understanding that his official vote, opinion, judgment, or action shall be influenced thereby, or shall be given in any particular manner, or upon any particular side of any question or matter upon which he may be required to act in his official capacity, or gives, or offers, or promises to give any official vote in consideration that another member of the legislative assembly shall give any such vote, either upon the same or another question, is punishable by imprisonment in the state prison not less than one nor more than ten years.

History: En. Sec. 165, Pen. C. 1895;
re-en. Sec. 8195, Rev. C. 1907; re-en. Sec.
10839, R. C. M. 1921. Cal. Pen. C. Sec. 86.

94-2907. (10840) Solicitation of bribes. Every person elected to either house of the legislative assembly who offers or promises to give his vote or influence in favor of or against any measure or proposition, pending or proposed to be introduced into the legislative assembly, in consideration or upon condition that any other person elected to the same legislative assembly will give, or will promise or assent to give, his vote or influence, in favor of or against any other measure or proposition, pending or proposed to be introduced into such legislative assembly, is guilty of solicitation of bribery, and is punishable in the state prison not less than one year nor more than ten years.

History: En. Sec. 166, Pen. C. 1895;
re-en. Sec. 8196, Rev. C. 1907; re-en. Sec.
10840, R. C. M. 1921.

94-2908. (10841) Bribery of members of legislative assembly. Every member of the legislative assembly who gives his vote or influence for or against any measure or proposition, pending or proposed to be introduced in such legislative assembly, or offers, promises, or assents to give the same, upon condition that any other member will give, or will promise or assent to give, his vote or influence in favor of or against any other measure or proposition, pending or proposed to be introduced in such legislative assembly, or in consideration that any other member hath given his vote or influence for or against any other measure or proposition in such legislative assembly, is guilty of bribery, and is punishable in the state prison not less than one nor more than ten years.

History: En. Sec. 167, Pen. C. 1895;
re-en. Sec. 8197, Rev. C. 1907; re-en. Sec.
10841, R. C. M. 1921.

94-2909. (10842) Bribery of public officers generally. Every person who, directly or indirectly, offers, gives, or promises any money or thing of value, testimonial, privilege, or personal advantage to any executive or judicial officer, or member of the legislative assembly, or to any public officer of the state, or of any municipal division thereof, to influence him in the performance of any of his official or public duties, is guilty of bribery, and is punishable in the state prison not less than one nor more than ten years.

History: En. Sec. 168, Pen. C. 1895; Bribery 81 (1).
re-en. Sec. 8198, Rev. C. 1907; re-en. Sec. 11 C.J.S. Bribery §§ 1, 2.
10842, R. C. M. 1921.

94-2910. (10843) Corrupt solicitation of official action constitutes solicitation of bribery. Every person who corruptly solicits, directly or indirectly, the official action of any member of the legislative assembly, or of any public officer of the state, or of any municipal division thereof, is guilty of the occupation and practice of solicitation of bribery, and is punishable in the state prison not less than one nor more than ten years.

History: En. Sec. 169, Pen. C. 1895;
re-en. Sec. 8199, Rev. C. 1907; re-en. Sec.
10843, R. C. M. 1921.

94-2911. (10844) Personal interest in bill. Every member of the legislative assembly who has a personal or private interest in any measure or bill, proposed or pending before the legislative assembly of which he is a member, and does not disclose the fact to the house of which he is a member, and votes thereon, is guilty of a misdemeanor.

History: En. Sec. 170, Pen. C. 1895; States 81.
re-en. Sec. 8200, Rev. C. 1907; re-en. Sec. 59 C.J. States § 230.
10844, R. C. M. 1921.

94-2912. (10845) Witnesses refusing to attend, etc., before the legislative assembly. Every person who, being summoned to attend as a witness before either house of the legislative assembly, or any committee thereof, refuses or neglects, without lawful excuse, to attend pursuant to such summons, and every person who, being present before either house of the legislative assembly, or any committee thereof, wilfully refuses to be sworn, or to answer any material and proper question, or to produce, upon reasonable

notice, any material and proper books, papers, or documents in his possession or under his control, is guilty of a misdemeanor.

History: En. Sec. 171, Pen. C. 1895; re-en. Sec. 8201, Rev. C. 1907; re-en. Sec. 10845, R. C. M. 1921. Cal. Pen. C. Sec. 87.

59 C.J. States § 82 et seq.
Power of legislative body or committee to compel attendance of nonmember as witness. 50 ALR 21.

States—34.

94-2913. (10846) Lobbying. Every person who obtains, or seeks to obtain money or other thing of value from another person, upon a pretense, claim, or representation that he can or will improperly influence in any manner the action of any member of any legislative body in regard to any vote or legislative matter, is guilty of felony. Upon the trial no person, otherwise competent as a witness, shall be excused from testifying as such concerning the offense charged, on the ground that such testimony may criminate himself, or subject him to public infamy, but such testimony shall not afterward be used against him in any judicial proceeding, except for perjury in giving such testimony.

History: En. Sec. 172, Pen. C. 1895; re-en. Sec. 8202, Rev. C. 1907; re-en. Sec. 10846, R. C. M. 1921. Cal. Pen. C. Sec. 89.

8 Am. Jur. 885, Bribery generally; 12 Am. Jur. 703-713, Contracts, §§ 202-208. Validity of lobbying contract. 29 ALR 157.

Bribery—1 (1); Witnesses—296, 297. 11 C.J.S. Bribery §§ 1, 2.

Constitutionality of statute as to lobbying. 63 ALR 941.

94-2914. (10847) Members of legislative assembly, in addition to other penalties, to forfeit office, etc. Every member of the legislative assembly convicted of any crime defined in this chapter, in addition to the punishment prescribed, forfeits his office, and is forever disqualified from holding any office in this state.

History: En. Sec. 173, Pen. C. 1895; re-en. Sec. 8203, Rev. C. 1907; re-en. Sec. 10847, R. C. M. 1921. Cal. Pen. C. Sec. 88.

States—52.
59 C.J. States § 209 et seq.

94-2915. (10848) Bribery and solicitation of bribery by member of legislature. Any person elected to either house of the legislative assembly, who shall offer or promise to give his vote or influence in favor of or against any measure or proposition, pending or proposed to be introduced into the legislative assembly, in consideration or upon condition that any other person elected to the same legislative assembly will give or will promise or assent to give, his vote or influence in favor of or against any other measure or proposition, pending or proposed to be introduced into such legislative assembly, shall be deemed guilty of solicitation of bribery. Any member of the legislative assembly who shall give his vote or influence for or against any measure or proposition pending or proposed to be introduced in such legislative assembly, or offer, promise, or assent so to, upon condition that any other member will give, or will promise or assent to give, his vote or influence in favor of or against any other measure or proposition pending or proposed to be introduced in such legislative assembly, or in consideration that any other member hath given his vote or influence for or against any other measure or proposition in such legislative assembly, shall be deemed guilty of bribery.

History: En. Sec. 1, p. 44, L. 1893; re-en. Sec. 174, Pen. C. 1895; re-en. Sec. 8204, Rev. C. 1907; re-en. Sec. 10848, R. C. M. 1921.

Bribery[Ⓒ]1 (2).

11 C.J.S. Bribery §§ 1, 3.

Court's power to correct date of offense.

7 ALR 1531.

94-2916. (10849) Bribery of member of legislature. Any person who shall, directly or indirectly offer, give or promise any money or thing of value, testimonial, privilege, or personal advantage, to any executive or judicial officer or member of the legislative assembly, to influence him in the performance of any of his official or public duties, shall be deemed guilty of bribery.

History: En. Sec. 2, p. 44, L. 1893; 8205, Rev. C. 1907; re-en. Sec. 10849, re-en. Sec. 175, Pen. C. 1895; re-en. Sec. R. C. M. 1921.

94-2917. (10850) Acts constituting bribery. Any person or persons who shall give, or promise, or offer to give or promise, any member of either house of the legislative assembly any money, office, paper, or property, or other valuable thing, or shall offer to do for such member, or any member of his family, relative, or other person, anything not common to the people of the state, county, township, or community in which such person resides, in consideration that such member shall vote in either house of the legislative assembly in any given way, or in consideration that such member shall do, or omit to do, anything pertaining to his office or duty as a member of such legislative assembly, shall be deemed guilty of bribery.

History: En. Sec. 3, p. 44, L. 1893; 8206, Rev. C. 1907; re-en. Sec. 10850, re-en. Sec. 176, Pen. C. 1895; re-en. Sec. R. C. M. 1921.

94-2918. (10851) Same. Any person or persons who shall, directly or indirectly, give any money, property, or other valuable thing, or make any promise of any kind whatever, with the intent to have it proffered to such member of the legislative assembly to influence his vote or action in connection with his said office by any other person than himself, or shall aid or abet in the commission of the offense described in the two preceding sections of this act, shall be deemed guilty of bribery.

History: En. Sec. 4, p. 45, L. 1893; 8207, Rev. C. 1907; re-en. Sec. 10851, re-en. Sec. 177, Pen. C. 1895; re-en. Sec. R. C. M. 1921.

94-2919. (10852) Penalties for violation of act. Every person convicted of violating any of the provisions of this act shall be punishable by imprisonment in the state penitentiary for a term of not less than five years nor more than twenty years, or by a fine not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment, and shall be forever disqualified from voting or holding any office in this state; and any member of the legislative assembly, or person elected thereto, who shall be convicted of violating any of the provisions of this act shall, in addition to the punishment above prescribed, be expelled therefrom.

History: En. Sec. 5, p. 45, L. 1893; re-en. Sec. 178, Pen. C. 1895; re-en. Sec. 8208, Rev. C. 1907; re-en. Sec. 10852, R. C. M. 1921.

Bribery[Ⓒ]16; Officers[Ⓒ]31; States[Ⓒ]52.

11 C.J.S. Bribery § 20; 59 C.J. States § 209 et seq.

CHAPTER 30

LOTTERIES

- Section 94-3001. Lottery defined.
 94-3002. Drawings for prizes or premiums not contemplated by act, when.
 94-3003. Punishment for drawing lottery.
 94-3004. Punishment for selling lottery tickets.
 94-3005. Aiding lotteries.
 94-3006. Lottery offices—advertising lottery offices.
 94-3007. Insuring lottery tickets—publishing offers to insure.
 94-3008. Property offered for disposal in lottery forfeited.
 94-3009. Letting building for lottery purposes.
 94-3010. Lotteries out of this state.
 94-3011. Punishment.

94-3001. (11149) Lottery defined. A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known.

History: En. Sec. 580, Pen. C. 1895; re-en. Sec. 8406, Rev. C. 1907; re-en. Sec. 11149, R. C. M. 1921; amd. Sec. 1, Ch. 36, L. 1935. Cal. Pen. C. Sec. 319.

Cross-Reference

Gambling, sec. 94-2401 et seq.

"Bank Night" Drawings at Theatres

In an action by the state to enjoin the operation of "bank night" drawings as a lottery under this section, submitted on an agreed statement of facts wherein it was stipuated among other matters that "the money that is used for the purpose of purchasing the defense bond is received from the rental of the store and office properties of the defendant corporation in the theatre buildings, and not from the sale of admission tickets to the theatre," held, on the facts presented, that the scheme did not constitute a lottery, and State ex rel. Dussault v. Fox Missoula Theatre Corp., 110 M 441, 101 P 2d 1065 overruled, and second part of section 2, article XIX, constitution is not self executing. State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 57, 70, 132 P 2d 689.

Held, on the authority of State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 132 P 2d 689, that in the absence of a showing that the winner of a prize offered by a theatre on "bank night," had paid a valuable consideration for the chance to win, the finding of the court that the scheme constituted a lottery under this section and as such a nuisance under section 94-1002, was error. State ex rel. Smith v. Fox Missoula Theatre Corporation, 114 M 102, 103, 132 P 2d 711.

"Keno" Held Gambling Game

In State v. Hahn, 105 M 270, 72 P 2d 459, a game in all essentials the same as the game of "keno" described in the instant case, was held to be a lottery and prohibited by sections 94-3001 to 94-3011. In scores of other cases "keno" has been held to be a game of chance within the meaning of statutes prohibiting gambling. Gambling is a generic term, embracing within its meaning all forms of play or game for stakes wherein one or the other participating stands to win or lose as a matter of chance. Play at lottery is gambling. State ex rel. Leahy v. O'Rourke, 115 M 502, 504, 146 P 2d 168.

"Lottery," What Constitutes—Requisites

The legal requisites necessary to charge the offense of operating a lottery under this section are the offering of a prize, the awarding of the prize by chance, and the giving of a consideration for an opportunity to win the prize. State v. Hahn, 105 M 270, 273, 72 P 2d 459.

"Pay" a "Valuable Consideration" Distinguished from "Furnishing"

The words "pay" a "valuable consideration" used in this section are not synonymous with furnishing a good consideration required as the basis for an enforceable contract according to the context, and their approved usage. "Consideration" is defined by section 13-501 as that which is paid to the promisor "as an inducement". Held, that what can be obtained free cannot be said to have been induced by a consideration; hence one purchasing an admission ticket in order to obtain a chance to win which he can have free of

charge, does not pay consideration for the gratuity. *State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*, 114 M 52, 65, 132 P 2d 689.

Receipt of Something Extra When Purchasing Commodity or Service at Regular Price, Not a Lottery

Where, to advertise or develop a legitimate business, patrons receive gratuitously something extra, whether a chance to participate in a drawing, or an oatmeal dish, when purchasing an actual commodity or service sold at the regular price, without subterfuge, and receive that article not measurably cheapened, all of what the patron pays is obviously consideration for the commodity or service itself, and therefore no part of the money paid can be held consideration for the chance itself; and the scheme cannot be held a lottery. *State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*, 114 M 52, 80, 132 P 2d 689.

"Skill Ball"—Sufficiency of Information

Where county attorney first set out his charge in the language of the lottery statute, this section, which in essence contains the legal requisites; he went further and proceeded to set out in detail the game, and while it is conceivable that in pursuing this method a prosecutor might plead himself out of court by detailing facts which when challenged by demurrer would show themselves to be without the ban of the statute, it was not true of this information because the essential elements were supplied by the particulars. *State v. Hahn*, 105 M 270, 274, 72 P 2d 459.

Test Whether Game One of Skill or Chance

To defeat a charge of conducting a lottery (styled "skill ball") it is not enough

that some skill is involved in the game, the test to be applied in determining whether a game is one of skill or chance being, not whether it contains an element of skill or an element of chance, but which of the two is the dominating element that determines the result of the game. *State v. Hahn*, 105 M 270, 274, 72 P 2d 459.

Whether Prize Cash or Merchandise Immaterial

To constitute a lottery, it is immaterial whether the prize be given in cash or in merchandise so long as it was awarded by chance and a consideration paid for that chance. *State v. Hahn*, 105 M 270, 275, 72 P 2d 459.

References

State v. Gateway Mortuaries, Inc., et al., 87 M 225, 253, 287 P 156.

Lotteries—3.

38 C.J. Lotteries § 3 et seq.

34 Am. Jur. 664, Lotteries, §§ 22 et seq.

Trading-stamp schemes as lotteries or gift enterprises. 26 ALR 724.

Scheme by which award depends upon votes as a lottery. 41 ALR 1484.

Scheme for advertising or stimulating legitimate business as a lottery. 48 ALR 1115.

Scheme for increasing attendance at theaters, etc., as lottery. 103 ALR 866.

Statute exempting scheme for benefit of public, religious or charitable purposes from statute against lotteries. 103 ALR 875.

"Numbers game" or "policy game" as a lottery. 105 ALR 305.

Right to recover "bank night" prize as affected by question whether scheme is a lottery. 120 ALR 412.

94-3002. (11149.1) Drawings for prizes or premiums not contemplated by act, when. This act shall not apply to the giving away of cash or merchandise attendance prizes or premiums by public drawings at agricultural fairs or rodeo associations in this state, and the county fair commissioners of agricultural fairs or rodeo associations in this state may give away at such fairs cash or merchandise attendance prizes or premiums by public drawings.

History: En. Sec. 2, Ch. 36, L. 1935.

94-3003. (11150) Punishment for drawing lottery. Every person who contrives, prepares, sets up, proposes, or draws any lottery is guilty of a misdemeanor.

History: En. Sec. 581, Pen. C. 1895; re-en. Sec. 8407, Rev. C. 1907; re-en. Sec. 11150, R. C. M. 1921.

Lotteries—21.

38 C.J. Lotteries § 73 et seq.

94-3004. (11151) Punishment for selling lottery tickets. Every person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person, any ticket, chance, share or interest or any paper, certifi-

cate or instrument purporting or understood to be or to represent any ticket, chance, share or interest in, or depending upon the event of any lottery is guilty of a misdemeanor.

History: En. Sec. 582, Pen. C. 1895; re-en. Sec. 8408, Rev. C. 1907; re-en. Sec. 11151, R. C. M. 1921. Cal. Pen. C. Sec. 321.

Immaterial, If Based on Nonexistent Lottery

In a proceeding to enjoin a theatre corporation from operating "bank night" drawings as a nuisance under the lottery statute, section 94-3001, the sole question under the pleadings was whether a lottery was being conducted, not whether defend-

ant was violating this section; hence where the evidence fails to prove the existence of a lottery, as held in the instant case, the claim advanced thereafter on appeal that there was also a violation of this section, becomes immaterial. State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 69, 132 P 2d 689.

Lotteries—23.
38 C.J. Lotteries § 38.
34 Am. Jur. 665, Lotteries, § 24.

94-3005. (11152) Aiding lotteries. Every person who aids or assists, either by printing, writing, advertising, publishing or otherwise, in setting up, managing or drawing any lottery or in selling or disposing of any ticket, chance, or share therein, is guilty of a misdemeanor.

History: En. Sec. 583, Pen. C. 1895; re-en. Sec. 8409, Rev. C. 1907; re-en. Sec. 11152, R. C. M. 1921. Cal. Pen. C. Sec. 322.

Lotteries—21, 22.
38 C.J. Lotteries § 36 et seq.

94-3006. (11153) Lottery offices—advertising lottery offices. Every person who opens, sets up or keeps, by himself, or by any other person, any office or any other place for the sale of, or for registering the number of any ticket in any lottery within or without this state, or who by printing, writing, or otherwise, advertises or publishes the setting up, opening, or using of, any such office is guilty of a misdemeanor.

History: En. Sec. 584, Pen. C. 1895; re-en. Sec. 8410, Rev. C. 1907; re-en. Sec. 11153, R. C. M. 1921. Cal. Pen. C. Sec. 323.

34 Am. Jur. 668, Lotteries, § 27.
Scheme for advertising or stimulating legitimate business as lottery. 48 ALR 1115.

94-3007. (11154) Insuring lottery tickets—publishing offers to insure. Every person who insures or receives any consideration for insuring for or against the drawing of any ticket in any lottery whatever, whether drawn or to be drawn within this state or not, or who receives any valuable consideration upon any agreement to repay any sum or deliver the same, or any other property if any lottery ticket or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not be drawn at any particular time, or in any particular order, or who promises or agrees to pay any sum of money, or to deliver any goods, things in action or property, or to forbear to do anything for the benefit of any person, with or without consideration, upon any event or contingency, dependent on the drawing of any ticket in any lottery, or who publishes any notice or proposal of any the purposes aforesaid, is guilty of a misdemeanor.

History: En. Sec. 585, Pen. C. 1895; re-en. Sec. 8411, Rev. C. 1907; re-en. Sec. 11154, R. C. M. 1921. Cal. Pen. C. Sec. 324.

Lotteries—24.
38 C.J. Lotteries § 40.

94-3008. (11155) Property offered for disposal in lottery forfeited. All moneys or property offered for sale or distribution in violation of any of the

provisions of this chapter, are forfeited to the state, and may be recovered by information filed, or by an action brought by the attorney general, or by any county attorney in the name of the state. Upon the filing of the information or complaint, the clerk of the court, or, if the suit is in a justice's court, the justice, must issue an attachment against the property mentioned in the complaint or information, which attachment has the same force and effect against such property, and is issued in the same manner as attachments are issued from the district courts in civil cases.

History: En. Sec. 586, Pen. C. 1895; Lotteries \Rightarrow 18, 19.
re-en. Sec. 8412, Rev. C. 1907; re-en. Sec. 38 C.J. Lotteries § 74.
11155, R. C. M. 1921. Cal. Pen. C. Sec. 325.

94-3009. (11156) Letting building for lottery purposes. Every person who lets or permits to be used, any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing, or drawing, any lottery, or for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor.

History: En. Sec. 587, Pen. C. 1895; Lotteries \Rightarrow 20.
re-en. Sec. 8413, Rev. C. 1907; re-en. Sec. 38 C.J. Lotteries § 43.
11156, R. C. M. 1921. Cal. Pen. C. Sec. 326.

94-3010. (11157) Lotteries out of this state. The provisions of this chapter are applicable to lotteries drawn or to be drawn out of this state, whether authorized or not by the laws of the state or country where they are drawn or to be drawn, in the same manner as to lotteries drawn or to be drawn within this state.

History: En. Sec. 588, Pen. C. 1895; Lotteries \Rightarrow 3.
re-en. Sec. 8414, Rev. C. 1907; re-en. Sec. 38 C.J. Lotteries § 86.
11157, R. C. M. 1921.

94-3011. (11158) Punishment. Every person convicted of any of the offenses mentioned in this chapter, is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding two thousand dollars, or both.

History: En. Sec. 589, Pen. C. 1895; Lotteries \Rightarrow 30.
re-en. Sec. 8415, Rev. C. 1907; re-en. Sec. 38 C.J. Lotteries § 73.
11158, R. C. M. 1921.

CHAPTER 31

MACHINE GUN ACT

Section	94-3101.	Definitions.
	94-3102.	Possession or use of machine gun—when unlawful.
	94-3103.	Punishment for possession or use of machine gun for offensive purpose.
	94-3104.	Presumption of possession or use for offensive or aggressive purpose.
	94-3105.	Presence of gun as evidence of possession or use.
	94-3106.	Exceptions.
	94-3107.	Manufacturer to keep register of machine guns—contents—inspection—penalty for failure to keep.
	94-3108.	Registration of machine guns now in state and hereafter acquired—presumption from failure to register.
	94-3109.	Warrant to search for and seize machine guns—confiscation of guns.
	94-3110.	Uniformity of interpretation.
	94-3111.	Short title.

94-3101. (11317.1) Definitions. "Machine gun" applies to and includes a weapon of any description by whatever name known, loaded or unloaded, from which more than six shots or bullets may be rapidly, or automatically, or semi-automatically discharged from a magazine, by a single function of the firing device.

"Crime of violence" applies to and includes any of the following crimes or an attempt to commit any of the same, namely, murder, manslaughter, kidnaping, rape, mayhem, assault to do great bodily harm, robbery, burglary, housebreaking, breaking and entering, and larceny.

"Person" applies to and includes firm, partnership, association or corporation.

History: En. Sec. 1, Ch. 43, L. 1935.

NOTE.—Uniform State Law. Sections 94-3101 to 94-3111 constitute the "Uniform Machine Gun Act" approved by the National Conference of Commissioners of Uniform State Laws in 1932 and adopted

in the states of Arkansas, Connecticut, Maryland, South Dakota, Virginia and Wisconsin.

Weapons⊖4.

68 C.J. Weapons § 1.

94-3102. (11317.2) Possession or use of machine gun—when unlawful. Possession or use of a machine gun in the perpetration or attempted perpetration of a crime of violence is hereby declared to be a crime punishable by imprisonment in the state penitentiary for a term of not less than twenty years.

History: En. Sec. 2, Ch. 43, L. 1935.

Weapons⊖4.

68 C.J. Weapons § 11 et seq.

94-3103. (11317.3) Punishment for possession or use of machine gun for offensive purpose. Possession or use of a machine gun for offensive or aggressive purpose is hereby declared to be a crime punishable by imprisonment in the state penitentiary for a term of not less than ten years.

History: En. Sec. 3, Ch. 43, L. 1935.

94-3104. (11317.4) Presumption of possession or use for offensive or aggressive purpose. Possession or use of a machine gun shall be presumed to be for offensive or aggressive purpose:

(a) When the machine gun is on premises not owned or rented, for bona fide permanent residence or business occupancy, by the person in whose possession the machine gun may be found; or

(b) When in the possession of, or used by, an unnaturalized foreign-born person, or a person who has been convicted of a crime of violence in any court of record, state or federal, of the United States of America, its territories or insular possessions; or

(c) When the machine gun is of the kind described in section 94-3108 and has not been registered as in said section required; or

(d) When empty or loaded pistol shells of 30 (.30 in. or 7.63 mm.) or larger caliber which have been or are susceptible of use in the machine gun are found in the immediate vicinity thereof.

History: En. Sec. 4, Ch. 43, L. 1935.

Weapons⊖17 (2).

68 C.J. Weapons § 56.

94-3105. (11317.5) Presence of gun as evidence of possession or use. The presence of a machine gun in any room, boat, or vehicle shall be evidence

of the possession or use of the machine gun by each person occupying the room, boat, or vehicle where the weapon is found.

History: En. Sec. 5, Ch. 43, L. 1935.

94-3106. (11317.6) Exceptions. Nothing contained in this act shall prohibit or interfere with:

1. The manufacture for, and sale of, machine guns to the military forces or the peace officers of the United States or of any political subdivision thereof, or the transportation required for that purpose;

2. The possession of a machine gun for scientific purpose, or the possession of a machine gun not usable as a weapon and possessed as a curiosity, ornament, or keepsake;

3. The possession of a machine gun other than one adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber, for a purpose manifestly not aggressive or offensive.

History: En. Sec. 6, Ch. 43, L. 1935.

94-3107. (11317.7) Manufacturer to keep register of machine guns—contents—inspection—penalty for failure to keep. Every manufacturer shall keep a register of all machine guns manufactured or handled by him. This register shall show the model and serial number, date of manufacture, sale, loan, gift, delivery or receipt, of every machine gun, the name, address, and occupation of the person to whom the machine gun was sold, loaned, given or delivered, or from whom it was received; and the purpose for which it was acquired by the person to whom the machine gun was sold, loaned, given or delivered, or from whom received. Upon demand every manufacturer shall permit any marshal, sheriff or police officer to inspect his entire stock of machine guns, parts, and supplies therefor, and shall produce the register, herein required, for inspection. A violation of any provision of this section shall be punishable by a fine of not less than one hundred dollars (\$100.00).

History: En. Sec. 7, Ch. 43, L. 1935.

94-3108. (11317.8) Registration of machine guns now in state and hereafter acquired—presumption from failure to register. Every machine gun now in this state adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber shall be registered in the office of the secretary of state, on the effective date of this act, and annually thereafter. If acquired hereafter it shall be registered within twenty-four hours after its acquisition. Blanks for registration shall be prepared by the secretary of state, and furnished upon application. To comply with this section the application as filed must show the model and serial number of the gun, the name, address and occupation of the person in possession, and from whom and the purpose for which, the gun was acquired. The registration date shall not be subject to inspection by the public. Any person failing to register any gun as required by this section, shall be presumed to possess the same for offensive or aggressive purpose.

History: En. Sec. 8, Ch. 43, L. 1935.

94-3109. (11317.9) Warrant to search for and seize machine guns—confiscation of guns. Warrant to search any house or place and seize any

machine gun adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber possessed in violation of this act, may issue in the same manner and under the same restrictions as provided by law for stolen property, and any court of record, upon application of the county attorney, shall have jurisdiction and power to order any machine gun, thus or otherwise legally seized, to be confiscated and either destroyed or delivered to a peace officer of the state or a political subdivision thereof.

History: En. Sec. 9, Ch. 43, L. 1935.

94-3110. (11317.10) Uniformity of interpretation. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 11, Ch. 43, L. 1935.

94-3111. (11317.11) Short title. This act may be cited as the Uniform Machine Gun Act.

History: En. Sec. 12, Ch. 43, L. 1935.

CHAPTER 32

MALICIOUS INJURIES TO RAILROADS, HIGHWAYS AND OTHER PROPERTY

- Section 94-3201. Injuries to highways, private ways and bridges.
 94-3202. Injuries to milestones and guideboards.
 94-3203. Tampering with telegraph, telephone and electric systems—penalty.
 94-3204. Taking water from or obstructing canals.
 94-3205. Interferences with railroad property.
 94-3206. Punishment.
 94-3207. Acts causing death punished as murder.
 94-3208. Remove waste or packing from locomotives or motors.
 94-3209. Interference with electric lines or apparatus.
 94-3210. Highway construction—leaving hard substance on railroad intersection—penalty.

94-3201. (11464) Injuries to highways, private ways and bridges. Every person who maliciously digs up, removes, displaces, breaks or otherwise injures or destroys any public highway, or any private way laid out by authority of law, or bridge upon such highway or private way, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such imprisonment and fine.

History: En. Sec. 1031, Pen. C. 1895; Highways § 163 (1-3)
 re-en. Sec. 8736, Rev. C. 1907; re-en. Sec. 40 C.J.S. Highways § 230.
 11464, R. C. M. 1921. Cal. Pen. C. Sec. See generally, 34 Am. Jur. 687, Malicious
 588. Mischief.

94-3202. (11465) Injuries to milestones and guideboards. Every person who maliciously removes or injures any mileboard, post, or stone, or guidepost or any inscription on such, erected upon any highway, is guilty of a misdemeanor.

History: En. Sec. 1032, Pen. C. 1895; 11465, R. C. M. 1921. Cal. Pen. C. Sec.
 re-en. Sec. 8737, Rev. C. 1907; re-en. Sec. 590.

94-3203. (11466) Tampering with telegraph, telephone and electric systems—penalty. Any person who wilfully and maliciously displaces, removes, injures, destroys or obstructs any telegraph, telephone or electric

light line, wire, cable, pole or conduit belonging to another, or the material or property appurtenant thereto, or maliciously and wilfully cuts, breaks, taps, or makes any connection with any telegraph or telephone line, wire, cable, or instrument belonging to another, or maliciously and wilfully reads, takes or copies any messages, communication or report intended for another passing over any such telegraph or telephone line, wire, or cable, in this state, or who wilfully and maliciously prevents, obstructs or delays by any means or contrivance whatsoever the sending, transmission, conveyance or delivery in this state of any message, communication or report by or through any telegraph or telephone line, wire or cable or who uses any apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned, or who aids, agrees with, employs or conspires with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than three hundred dollars (\$300.00) nor more than one thousand dollars (\$1,000.00) or imprisonment in the county jail not exceeding one year, or both, in the discretion of the court. And it shall be unlawful for any person who, for nonpayment of dues, tolls, or other good and sufficient reasons, has been disconnected from service with any telephone, telegraph or electric light or power system in this state to connect or allow himself to be connected with any such company lines without direct and express permission from the official authorized to permit such reconnection. Any person or persons who shall violate or cause to be violated this provision shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100.00) or imprisonment in the county jail for ten days, or both, in the discretion of the court.

History: En. Sec. 1033, Pen. C. 1895; Electricity 21; Telegraphs and Tele-
re-en. Sec. 8738, Rev. C. 1907; re-en. Sec. phones 79.
11466, R. C. M. 1921; re-en. Sec. 1, Ch. 29 C.J.S. Electricity §§ 76, 77.
66, L. 1929. Cal. Pen. C. Sec. 591.

94-3204. (11467) Taking water from or obstructing canals. Every person who shall, without authority of the owner or managing agent, and with intent to defraud, take water from any canal, ditch, flume or reservoir, used for the purpose of holding or conveying water for manufacturing, agricultural, mining or domestic uses, or who, without like authority, shall raise, lower, or otherwise disturb any gate or other appurtenance thereof used for the control or the measurement of water, or who shall empty or place, or cause to be emptied or placed into any such canal, ditch, flume or reservoir, any rubbish, filth or obstruction to the free flow of the water, is guilty of a misdemeanor.

History: En. Sec. 1034, Pen. C. 1895; **References**
re-en. Sec. 8739, Rev. C. 1907; re-en. Sec. State v. Hersman, 92 M 596, 19 P 2d
11467, R. C. M. 1921. Cal. Pen. C. Sec. 1117.

Canals 24.
12 C.J.S. Canals §§ 19, 24, 28.

94-3205. (11468) Interferences with railroad property. Every person who, within the state of Montana, wilfully and maliciously either—

1. Burns, breaks, cuts, derails, destroys, displaces, injures, obstructs, removes or places any explosive substance upon, in or under, any track,

switch, bridge, culvert, viaduct, roadbed, embankment, reservoir, water-tank, standpipe or appurtenances, station or section-house, coal dock, passenger, mail, baggage, express or freight car, caboose, engine, tender or other rolling-stock, or other appliance, part, structure, or fixture attached to, or used in connection with any operated railway, or any branch thereof, lying wholly or partially within this state, whether operated by steam or other motive power; or by letter or other writing, threatens to do, any of the foregoing acts or things; or,

2. Wrecks, whether by the use of dynamite or other explosive or any other means, any moving train, engine, cars or other rolling-stock of any such railroad or branch; or,

3. By intimidating any member of a train or engine crew, or any passenger, or otherwise stops, holds up, or interrupts the journey of any such train, engine, cars or rolling-stock, of any such railway, or branch thereof, for the purpose of gaining from any person, by any means, any money or other thing of value;

shall be deemed guilty of felony, and on conviction be punished by imprisonment in the state prison for a term not less than five years, and which may extend to the term of his natural life.

History: Ap. p. Sec. 1030, Pen. C. 1895; en. Sec. 1, Ch. 24, L. 1905; re-en. Sec. 8740, Rev. C. 1907; re-en. Sec. 11468, R. C. M. 1921. Cal. Pen. C. Sec. 587.

Offer of reward for arrest of train robbers, sec. 94-401-2.

Cross-References

Moving pictures of train robberies, penalty, sec. 94-3573.

Railroads⇒255 (1-6).

52 C.J. Railroads § 2331 et seq.

94-3206. (11469) Punishment. Any person who wilfully and maliciously attempts to commit any of the acts enumerated in the preceding section shall be deemed guilty of a felony, and punished by imprisonment in the state prison for not less than one year nor more than ten years.

History: En. Sec. 2, Ch. 24, L. 1905; re-en. Sec. 8741, Rev. C. 1907; re-en. Sec. 11469, R. C. M. 1921.

94-3207. (11470) Acts causing death punished as murder. If in the commission, or attempts to commit, any of the acts made felonies under section 94-3205 of these codes the death of any person shall be caused, the person so committing, or attempting to commit said acts or any thereof, shall be deemed guilty of murder in the first degree; and, on conviction thereof, shall suffer death.

History: En. Sec. 3, Ch. 24, L. 1905; re-en. Sec. 8742, Rev. C. 1907; re-en. Sec. 11470, R. C. M. 1921.

Homicide⇒18 (1).

40 C.J.S. Homicide §§ 21, 31-33.

94-3208. (11472) Remove waste or packing from locomotives or motors. If any person shall wilfully and maliciously take or remove the waste or packing or brass or brasses from any journal-box or boxes of any locomotive, engine, tender, carriage, coach, car, caboose or truck, used or operated or capable of being used or operated upon any railroad, hoisting engines, threshing machines, pumps or any other machinery, whether the same be operated by steam or electricity, the person so offending shall be guilty of a misdemeanor and on conviction shall be sentenced to pay a fine of not more

than one hundred dollars nor less than fifty dollars or by imprisonment in the county jail not more than six months, or both such fine and imprisonment.

History: En. Sec. 1, Ch. 46, L. 1903;
re-en. Sec. 8744, Rev. C. 1907; re-en. Sec.
11472, R. C. M. 1921.

Malicious Mischief⊖1.
38 C.J. Malicious Mischief § 1 et seq.

94-3209. (11473) Interference with electric lines or apparatus. Every person who unlawfully or maliciously takes down, removes, injures, interferes with or obstructs any line or lines erected or maintained for the purpose of transmitting electricity for developing light, heat or power, or any part thereof, or any insulation or crossarm appurtenance or apparatus connected therewith, or severs or in any way interferes with the wire or wires, cable or cables, current or currents thereof, or who attempts to do the same, is punishable by fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding one year.

History: En. Sec. 1, Ch. 71, L. 1903;
re-en. Sec. 8745, Rev. C. 1907; re-en. Sec.
11473, R. C. M. 1921. Cal. Pen. C. Sec.
593.

Cross-Reference
Moving house, interference with lines,
sec. 24-139.

Electricity⊖21.
29 C.J.S. Electricity §§ 76, 77.

94-3210. (11473.1) Highway construction—leaving hard substance on railroad intersection—penalty. Every person who, within the state of Montana while engaged in public or private road work, or otherwise, and whether wilfully, carelessly or negligently, leaves or deposits any earth, gravel, rock, or other hard substances, alongside of, upon, or between, the rails of any railroad, where any public or private highway crosses such railroad which will, by filling the grooves for the flanges of the wheels or otherwise endanger travel on such railroad and which may tend to or does derail locomotives or cars thereon shall be guilty of a misdemeanor and on conviction shall be fined not less than ten dollars (\$10.00), nor more than one hundred dollars (\$100.00), or by imprisonment in the county jail not more than six (6) months, or both such fine and imprisonment.

History: En. Sec. 1, Ch. 41, L. 1927.

Railroads⊖12.
52 C.J. Railroads § 2331 et seq.

CHAPTER 33

MALICIOUS MISCHIEF GENERALLY

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| Section | 94-3301. Malicious injury or destruction of property—punishment. |
| | 94-3302. Specifications in following sections not restriction. |
| | 94-3303. Burning buildings, etc., not the subject of arson. |
| | 94-3304. Destruction of buildings by explosives—punishment. |
| | 94-3305. Use of automobiles without consent of owners—punishment. |
| | 94-3306. Possessing automobile from which number or marks have been removed or altered. |
| | 94-3307. Same—penalty. |
| | 94-3308. Malicious injuries to freehold. |
| | 94-3309. Injuring fences, building fires and hunting on premises of another when forbidden. |
| | 94-3310. Injuries to standing crops, etc. |
| | 94-3311. Removing, defacing or altering landmarks. |
| | 94-3312. Destruction of fence or enclosure. |
| | 94-3313. Destroying or injuring jails. |

- 94-3314. Destroying or injuring dams, etc.
- 94-3315. Burning or injuring rafts, setting adrift vessels.
- 94-3316. Obstructing navigable rivers.
- 94-3317. Injuries to United States surveyors' monuments.
- 94-3318. Destroying or tearing down notices.
- 94-3319. Injuring or destroying written instrument.
- 94-3320. Opening or publishing sealed letters.
- 94-3321. Disclosing contents of telegraphic message.
- 94-3322. Altering telegraphic messages.
- 94-3323. Opening telegrams.
- 94-3324. Injuring works of art or improvements.
- 94-3325. Destroying works of literature, etc., in public libraries.
- 94-3326. Breaking or obstructing water pipes, etc.
- 94-3327. Setting fire to timber, etc., negligently.
- 94-3328. Setting and negligent control of fires—punishment.
- 94-3329. Setting fire to timber, etc., maliciously.
- 94-3330. Exposing infected clothing or person.
- 94-3331. Driving animals on sidewalk.
- 94-3332. Malicious spiking of sawlogs—penalty.
- 94-3333. Defacing public buildings.
- 94-3334. Injury to trees on public lands.

94-3301. (11474) Malicious injury or destruction of property—punishment. Every person who maliciously injures or destroys any real or personal property not his own, of the value of fifty dollars or over, in cases otherwise than such as are specified in this code, is guilty of a felony, and upon conviction thereof shall be punished by confinement in the state penitentiary for a term of not less than one year or more than five years, and every person who maliciously injures or destroys any real or personal property not his own of the value of less than fifty dollars, in cases otherwise than as specified in this code is guilty of a misdemeanor.

History: En. Sec. 1050, Pen. C. 1895; re-en. Sec. 8746, Rev. C. 1907; amd. Sec. 1, Ch. 10, Ex. L. 1918; re-en. Sec. 11474, R. C. M. 1921. Cal. Pen. C. Sec. 594.

References

State v. Benson, 91 M 109, 110, 5 P 2d 1045.

Malicious Mischief—1.

38 C.J. Malicious Mischief § 1.

See generally, 34 Am. Jur. 687, Malicious Mischief.

94-3302. (11475) Specifications in following sections not restriction. The specification of the acts enumerated in the following sections of this chapter is not intended to restrict or qualify the interpretation of the preceding section.

History: En. Sec. 1051, Pen. C. 1895; 11475, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8747, Rev. C. 1907; re-en. Sec. 595.

94-3303. (11476) Burning buildings, etc., not the subject of arson. Every person who wilfully and maliciously burns any bridge exceeding fifty dollars in value, or any building, snowshed or vessel not the subject of arson, or any stack of grain of any kind, or of hay, or any growing or standing grain, grass or tree, or any fence not the property of such person, is punishable by imprisonment in the state prison for not less than one nor more than ten years.

History: En. Sec. 1052, Pen. C. 1895; re-en. Sec. 8748, Rev. C. 1907; re-en. Sec. 11476, R. C. M. 1921. Cal. Pen. C. Sec. 600.

Operation and Effect

The malicious destruction of property is not a crime the commission of which is included in the crime of willful and mali-

cious burning of property, as defined by this section. *State v. Sieff*, 54 M 165, 168, 168 P 524. Arson⁵. 6 C.J.S. Arson § 6.

94-3304. (11477) Destruction of buildings by explosives—punishment. Any person who shall maliciously, by the explosion of gunpowder, nitro-glycerin, dynamite or any other explosive substance, blow up, destroy, throw down, or injure the whole or any part of any building, house, edifice, or structure, whether used for habitation, lodgement, abode or shelter of human beings, or for any agricultural, industrial, commercial, manufacturing, storage, milling, smelting, refining, transportation, educational, religious, charitable, scientific, library or art purposes, or any public building or structure owned or occupied by the state of Montana, or by any county, city or municipality of the state, or school district, or by the United States government, or any building, house, edifice or structure owned or used by any public utility or public utility corporation or company, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state penitentiary for a term, where not otherwise provided for in this code, of not less than one year and not more than ten years.

History: En. Sec. 1053, Pen. C. 1895; re-en. Sec. 8749, Rev. C. 1907; amd. Sec. 1, Ch. 9, Ex. L. 1918; re-en. Sec. 11477, R. C. M. 1921. Cal. Pen. C. Sec. 601. Explosives⁴. 35 C.J.S. Explosives §§ 4, 12.

94-3305. (11478) Use of automobiles without consent of owners—punishment. Any chauffeur or other person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building or place, or from any place or locality on a private or public highway, park or parkway, street, lot or field, alley, enclosure, or space, any automobile or motor vehicle, and operate or drive, or cause the same to be operated or driven, for his own profit, use or purpose, or for the profit, use or purpose of another, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by imprisonment in the state prison not exceeding five years.

History: En. Sec. 1, Ch. 27, L. 1915; amd. Sec. 1, Ch. 91, L. 1919; re-en. Sec. 11478, R. C. M. 1921.

Operation and Effect

Defendant was charged with taking and using an automobile without the consent of the owner, under this section, which makes the offense punishable by fine or imprisonment in the county jail, or by imprisonment in the state penitentiary not exceeding five years. The information was not filed until fourteen months after the commission of the offense. Held, under

this case, that the district court erred in sustaining a demurrer to the pleading on the ground that, the offense being a misdemeanor, the limitation of one year fixed by section 94-5703, within which the information could be filed had expired, and holding that it was without jurisdiction to proceed. *State v. Atlas*, 75 M 547, 550, 244 P 477.

Automobiles³339.

42 C.J. Motor Vehicles § 990.

5 Am. Jur. 936, Automobiles, § 809.

94-3306. (11479) Possessing automobile from which number or marks have been removed or altered. Every person within this state is hereby prohibited from knowingly buying, selling, receiving, disposing of, or concealing, or having in his possession any automobile, motor car, or motor vehicle from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced,

covered, altered, or destroyed, for the purpose of concealing or misrepresenting the identity of said automobile, motor car, or motor vehicle.

History: En. Sec. 1, Ch. 48, L. 1917;
re-en. Sec. 11479, R. C. M. 1921.

Automobiles 340.

42 C.J. Motor Vehicles § 994 et seq.
5 Am. Jur. 931, Automobiles, § 800.

94-3307. (11480) Same—penalty. Any person violating the provisions of the preceding section, and any person who shall knowingly buy, sell, receive, dispose of or conceal, or have in his possession, any automobile, motor car or motor vehicle from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced, covered, altered or destroyed, for the purpose of concealing or misrepresenting the identity of said automobile, motor car or motor vehicle, shall be guilty of a misdemeanor, and shall be punished by a fine of not more than two hundred dollars, or imprisonment not more than six months, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 48, L. 1917;
re-en. Sec. 11480, R. C. M. 1921.

94-3308. (11481) Malicious injuries to freehold. Every person who wilfully or maliciously commits any trespass by either—

1. Cutting down, destroying or injuring any kind of wood or timber standing or growing upon the lands of another; or

2. Carrying away any kind of timber or wood lying on such lands; or

3. Maliciously injuring or severing from the freehold of another anything attached thereto or the produce thereof; or

4. Digging, taking or carrying away from any lot situated within the limits of any incorporated city without the license of the owner or legal occupant thereof, any earth, soil, or stone; or

5. Digging, taking or carrying away from any land in any cities of the state, laid down on the map or plan of said cities otherwise recognized or established as a street or alley, avenue or park, without the license of the proper authorities, any earth, soil or stone; or

6. Putting up, fastening, printing or painting upon any property belonging to the state, or to any city, county, town or village, or dedicated to the public or upon any property of any person without license of the owner any notice, advertisement or designation thereof, or any name of any commodity, whether for sale or otherwise, or any picture, sign or device intended to call attention thereto; or

7. Hunting, without permission, upon the enclosed premises of another; or

8. Destroying, defacing or injuring any door, window or other portion of any vacant residence or other building, or maliciously opening any closed door or window of such buildings, or entering therein or on without the consent of the owner, agent or tenant of such premises or by authority of law; is guilty of misdemeanor.

History: Ap. p. Sec. 1054, Pen. C. 1895; 1907; re-en. Sec. 11481, R. C. M. 1921. Cal. amd. Sec. 1054, Ch. 64, L. 1903; en. Sec. Pen. C. Sec. 602.
1, Ch. 10, L. 1905; re-en. Sec. 8750, Rev. C.

94-3309. (11482) Injuring fences, building fires and hunting on premises of another when forbidden. Any person tearing down, breaking, or in-

juring any fence or other inclosure, for the purpose of entering upon the land or premises of another without the consent of the owner or occupant; any person who shall build a fire upon the land or premises of another within any inclosure, or who shall sever from such land or premises any tree, grass, or other product thereof, or shall take therefrom anything attached or appurtenant thereto, without the consent of the owner or occupant; and any person who shall hunt upon any inclosed land or premises where there is posted in a conspicuous place a sign or warning reading, "No hunting allowed on these premises," or a sign or warning reading, "No trespassing allowed on these premises," without the consent of the owner, shall be guilty of a misdemeanor and shall be punishable by a fine of not less than ten dollars, nor more than five hundred dollars, or imprisonment not exceeding six months in the county jail, or by both such fine and imprisonment; and shall also be liable to the person injured for all damages occasioned thereby.

History: En. Sec. 1, Ch. 36, L. 1915; re-en. Sec. 11482, R. C. M. 1921.

criminal prosecution under this section. *Herrin v. Sutherland*, 74 M 587, 241 P 328.

Operation and Effect

Where land is inclosed a person who hunts thereon without the consent of one entitled to its possession is a trespasser, and where land is posted warning persons against hunting thereon, he who does so in disregard of such warning is subject to

References

Martin v. City of Struthers, 319 U. S. 141, 148, 87 L. ed. 1313, 63 Sup. Ct. 862.

Fences⌘28 (1); Fires⌘1; Malicious Mischief⌘1.

36 C.J.S. Fences § 18; 36 C.J.S. Fires §§ 2-5, 9; 38 C.J. Malicious Mischief § 1.

94-3310. (11483) Injuries to standing crops, etc. Every person who maliciously injures or destroys any standing crops, grain, cultivated fruits or vegetables, the property of another, in any case for which a punishment is not prescribed by these codes, is guilty of a misdemeanor.

History: En. Sec. 1055, Pen. C. 1895; re-en. Sec. 8751, Rev. C. 1907; re-en. Sec. 11483, R. C. M. 1921. Cal. Pen. C. Sec. 604.

Crops⌘8.

25 C.J.S. Crops § 10.

94-3311. (11484) Removing, defacing or altering landmarks. Every person who either—

1. Maliciously removes any monument erected for the purpose of designating any point in the boundary of any lot or tract of land; or,

2. Wilfully or maliciously defaces or alters the marks upon any such monument; or,

3. Maliciously cuts down or removes any tree upon which any such marks have been made for such purpose, with intent to destroy such marks, is guilty of a misdemeanor.

History: En. Sec. 1056, Pen. C. 1895; re-en. Sec. 8752, Rev. C. 1907; re-en. Sec. 11484, R. C. M. 1921. Cal. Pen. C. Sec. 605.

Boundaries⌘56.

11 C.J.S. Boundaries §§ 126, 127.

94-3312. (11485) Destruction of fence or enclosure. Every person who wilfully and maliciously cuts, tears down, removes, or in any other manner injures or destroys any fence or other enclosure of lands, other than public, belonging to another, is guilty of a misdemeanor, and upon conviction is punishable by a fine not less than twenty-five dollars nor more than two

hundred dollars, or by imprisonment in the county jail not less than thirty days or more than six months, or by both such fine and imprisonment.

History: En. Sec. 1, Ch. 41, L. 1903;
re-en. Sec. 8753, Rev. C. 1907; re-en. Sec.
11485, R. C. M. 1921.

94-3313. (11486) Destroying or injuring jails. Every person who wilfully and intentionally breaks down, pulls down, or otherwise destroys or injures any public jail or other place of confinement, is punishable by fine not exceeding ten thousand dollars, or by imprisonment in the state prison not exceeding five years.

History: En. Sec. 148, p. 214, Bannack 1887; amd. Sec. 1057, Pen. C. 1895; re-en. Stat.; re-en. Sec. 177, p. 310, Cod. Stat. Sec. 8754, Rev. C. 1907; re-en. Sec. 11486, 1871; re-en. Sec. 177, 4th Div. Rev. Stat. R. C. M. 1921. Cal. Pen. C. Sec. 606.
1879; re-en. Sec. 220, 4th Div. Comp. Stat.

94-3314. (11487) Destroying or injuring dams, etc. Every person who wilfully and maliciously cuts, breaks, injures or destroys any bridge, dam, canal, flume, aqueduct, levee, embankment, reservoir or other structure erected to create hydraulic power, or to store or to conduct water for mining, manufacturing, or agricultural purposes, or for the supply of the inhabitants of any city or town, or any embankment necessary to the same, or either of them, or wilfully or maliciously makes or causes to be made any aperture in such dam, canal, flume, aqueduct, reservoir, embankment, levee, or structure, with intent to injure or destroy the same, is punishable by a fine not less than one hundred dollars, or by imprisonment in the county jail not exceeding two years, or both.

History: En. Sec. 147, p. 214, Bannack Sec. 8755, Rev. C. 1907; re-en. Sec. 11487, Stat.; re-en. Sec. 176, p. 310, Cod. Stat. R. C. M. 1921. Cal. Pen. C. Sec. 607.
1871; re-en. Sec. 176, 4th Div. Rev. Stat. ———
1879; re-en. Sec. 219, 4th Div. Comp. Stat. Bridges↔28 and other specific topics.
1887; amd. Sec. 1058, Pen. C. 1895; re-en. 11 C.J.S. Bridges §§ 9, 42.

94-3315. (11488) Burning or injuring rafts, setting adrift vessels. Every person who wilfully and maliciously burns, injures or destroys any pile or raft of wood, plankboards, or other lumber, or any part thereof, or cuts loose or sets adrift any such raft or part thereof, or cuts, breaks, injures, sinks, or sets adrift any vessel or boat, the property of another, is punishable by fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or both.

History: En. Sec. 146, p. 214, Bannack 1887; amd. Sec. 1059, Pen. C. 1895; re-en. Stat.; re-en. Sec. 175, p. 310, Cod. Stat. Sec. 8756, Rev. C. 1907; re-en. Sec. 11488, 1871; re-en. Sec. 175, 4th Div. Rev. Stat. R. C. M. 1921. Cal. Pen. C. Sec. 608.
1879; re-en. Sec. 218, 4th Div. Comp. Stat.

94-3316. (11489) Obstructing navigable rivers. Every person who unlawfully obstructs the navigation of any navigable stream, is guilty of a misdemeanor.

History: En. Sec. 1060, Pen. C. 1895; Navigable Waters↔27.
re-en. Sec. 8757, Rev. C. 1907; re-en. Sec. 45 C.J. Navigable Waters § 131 et seq.
11489, R. C. M. 1921. Cal. Pen. C. Sec. 611. Pollution of oyster beds. 3 ALR 762.
Pollution of stream by mining operations. 39 ALR 891.

94-3317. (11490) Injuries to United States surveyors' monuments. Every person who wilfully injures, defaces or removes any monument

erected, or marked or used by the surveyors of the United States to designate a point or corner in a survey under authority of the United States is guilty of a misdemeanor.

History: En. Sec. 1061, Pen. C. 1895; 11490, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8758, Rev. C. 1907; re-en. Sec. 615.

94-3318. (11491) Destroying or tearing down notices. Every person who intentionally—

1. Defaces, obliterates, tears down, or destroys any copy or transcript, or extract from or of any law of the United States or of this state, or any proclamation, advertisement or notification set up at any place in this state by authority of any law of the United States or of this state, or by order of any court, before the expiration of the time for which the same was to remain set up; or,

2. Defaces, obliterates, tears or destroys any notice placed or posted on a mining claim, or removes or destroys any stake or monument placed thereon to identify it,

is punishable by imprisonment in the county jail not exceeding three months or by a fine not exceeding one hundred dollars, or both.

History: En. Sec. 1062, Pen. C. 1895; 11491, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8759, Rev. C. 1907; re-en. Sec. 616.

94-3319. (11492) Injuring or destroying written instrument. Every person who maliciously mutilates, tears, defaces, obliterates or destroys any written instrument the property of another, the false making of which would be forgery, is punishable by imprisonment in the state prison not less than one nor more than five years.

History: En. Sec. 1063, Pen. C. 1895; 11492, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8760, Rev. C. 1907; re-en. Sec. 617.

94-3320. (11493) Opening or publishing sealed letters. Every person who wilfully opens or reads, or causes to be read any sealed letter not addressed to himself, without being authorized so to do either by the writer of such letter or by the person to whom it is addressed, and every person who, without the like authority, publishes any of the contents of such letter, knowing the same to have been unlawfully opened, is guilty of a misdemeanor.

History: En. Sec. 116, p. 205, Bannack 1887; amd. Sec. 1064, Pen. C. 1895; re-en. Stat.; re-en. Sec. 129, p. 298, Cod. Stat. Sec. 8761, Rev. C. 1907; re-en. Sec. 11493, 1871; re-en. Sec. 129, 4th Div. Rev. Stat. R. C. M. 1921. Cal. Pen. C. Sec. 618. 1879; re-en. Sec. 138, 4th Div. Comp. Stat.

94-3321. (11494) Disclosing contents of telegraphic message. Every person who wilfully discloses the contents of a telegraphic message, or any part thereof, addressed to another person without the permission of such person, unless directed so to do by the lawful order of a court, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both fine and imprisonment.

History: En. Sec. 1065, Pen. C. 1895; Cross-Reference
re-en. Sec. 8762, Rev. C. 1907; re-en. Sec. Secretly learning contents of telegram,
11494, R. C. M. 1921. Cal. Pen. C. Sec. sec. 94-35-220.
619.

Telegraphs and Telephones 629.

62 C.J. Telegraphs and Telephones § 145 et seq.

94-3322. (11495) Altering telegraphic messages. Every person who wilfully alters the purport, effect, or meaning of a telegraphic message to the injury of another, is punishable as provided in the preceding section.

History: En. Sec. 1066, Pen. C. 1895; re-en. Sec. 8763, Rev. C. 1907; re-en. Sec. 11495, R. C. M. 1921. Cal. Pen. C. Sec. 620.

Cross-Reference

Forgery of messages, sec. 94-2005.

94-3323. (11496) Opening telegrams. Every person not connected with any telegraph office who, without the authority or the consent of the person to whom the same may be directed, wilfully opens any sealed envelope inclosing a telegraphic message and addressed to another person, with the purpose of learning the contents of such message, or who fraudulently represents another person and thereby procures to be delivered to himself any telegraphic message addressed to such person, with the intent to use, destroy, or detain the same from the person or persons entitled to receive such message, is punishable as provided in section 94-3321.

History: En. Sec. 1067, Pen. C. 1895; 11496, R. C. M. 1921. Cal. Pen. C. Sec. 621. re-en. Sec. 8764, Rev. C. 1907; re-en. Sec. 621.

94-3324. (11497) Injuring works of art or improvements. Every person, not the owner thereof, who wilfully injures, disfigures, or destroys any monument, work of art, or useful or ornamental improvement within the limits of any village, town or city, or any shade tree or ornamental plant growing therein, whether situated upon private ground or on any street, sidewalk, or public park or place, is guilty of a misdemeanor.

History: En. Sec. 1068, Pen. C. 1895; re-en. Sec. 8765, Rev. C. 1907; re-en. Sec. 11497, R. C. M. 1921. Cal. Pen. C. Sec. 622.

of the frequent legislative use of the term "city or town" without any definite prefix, but under circumstances which would render it absurd to hold that only incorporated cities and towns are meant. State ex rel. Powers v. Dale, 47 M 227, 230, 131 P 670.

Operation and Effect

An illustration is found in this section

94-3325. (11498) Destroying works of literature, etc., in public libraries. Every person who maliciously cuts, tears, defaces, breaks, or injures any book, map, chart, picture, engraving, statue, coin, model, apparatus, or other work of literature, art or mechanics, or object of curiosity, deposited in any public library, gallery, museum, collection, fair, or exhibition, is guilty of felony.

History: En. Sec. 1069, Pen. C. 1895; re-en. Sec. 8766, Rev. C. 1907; re-en. Sec. 11498, R. C. M. 1921. Cal. Pen. C. Sec. 623.

94-3326. (11499) Breaking or obstructing water pipes, etc. Every person who wilfully breaks, digs up, obstructs, or injures any pipe or main for conducting gas or water, or any works erected for supplying buildings with gas or water, or any appurtenances or appendages therewith connected, is guilty of a misdemeanor.

History: En. Sec. 1070, Pen. C. 1895; re-en. Sec. 8767, Rev. C. 1907; re-en. Sec. 11499, R. C. M. 1921. Cal. Pen. C. Sec. 624.

Gas 23; Waters and Water Courses 212.

38 C.J.S. Gas § 5; 67 C.J. Waters § 849.

94-3327. (11500) Setting fire to timber, etc., negligently. Every person who carelessly sets fire to any timber, woodland or grass, except for useful or necessary purposes, or who at any time makes a campfire, or lights a fire for any purposes whatever without taking sufficient steps to secure the same from spreading from the immediate locality where it is used, or fails to extinguish such fire before leaving it, is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding two thousand dollars, or both.

History: En. Sec. 178, p. 310, Cod. Stat. 1871; re-en. Sec. 178, 4th Div. Rev. Stat. 1879; amd. Sec. 1, p. 48, L. 1881; re-en. Sec. 221, 4th Div. Comp. Stat. 1887; amd. Sec. 1071, Pen. C. 1895; re-en. Sec. 8768, Rev. C. 1907; re-en. Sec. 11500, R. C. M. 1921.

Fires⊕3.
36 C.J.S. Fires §§ 2-5.

94-3328. (11501) Setting and negligent control of fires—punishment. Every person who shall negligently or carelessly set on fire, or cause to be set on fire any woods, timber, prairie, or other combustible material, whether on his own land or not, by means whereby the property of another shall be endangered, or who shall negligently suffer any fire upon his own lands, or lands occupied by him, to extend beyond the limits thereof, shall be guilty of a misdemeanor, and is punishable by a fine of not less than one hundred dollars, nor more than five hundred dollars, or by imprisonment in the county jail for not less than one month, nor more than six months, or by both such fine and imprisonment.

History: En. Sec. 1, Ch. 13, Ex. L. 1918; re-en. Sec. 11501, R. C. M. 1921.

94-3329. (11502) Setting fire to timber, etc., maliciously. Every person who wantonly or designedly sets fire to any timber, woodland or grass, or maliciously fails to extinguish a fire after making the same for a necessary purpose, before leaving it, is punishable by imprisonment in the state prison not exceeding five years, or by fine not exceeding five thousand dollars, or both.

History: En. Sec. 179, p. 311, Cod. Stat. 1871; re-en. Sec. 179, 4th Div. Rev. Stat. 1879; amd. Sec. 2, p. 49, L. 1881; re-en. Sec. 222, 4th Div. Comp. Stat. 1887; amd. Sec. 1072, Pen. C. 1895; re-en. Sec. 8769, Rev. C. 1907; re-en. Sec. 11502, R. C. M. 1921.

See 22 Am. Jur. 663, Fires, § 98.

94-3330. (11503) Exposing infected clothing or person. Every person who exposes any clothing or person infected with the smallpox, or other contagious disease, with intent to cause the spread of such disease, is punishable by imprisonment in the state prison not exceeding five years.

History: En. Sec. 1073, Pen. C. 1895; re-en. Sec. 8770, Rev. C. 1907; re-en. Sec. 11503, R. C. M. 1921.

Health⊕37.
39 C.J.S. Health §§ 30, 31.

94-3331. (11504) Driving animals on sidewalk. Every person who, wilfully and without authority, drives any team, vehicle or animal along or upon a sidewalk in a town or city, is punishable by imprisonment in the county jail not exceeding one month, or by a fine not exceeding fifty dollars, or both.

History: En. Sec. 1074, Pen. C. 1895; re-en. Sec. 8771, Rev. C. 1907; re-en. Sec. 11504, R. C. M. 1921.

Operation and Effect

An illustration is found in this section of the frequent legislative use of the term

"city or town" without any definite prefix, but under circumstances which would render it absurd to hold that only incorporated cities and towns are meant. State ex rel. Powers v. Dale, 47 M 227, 230, 131 P 670.

Municipal Corporations⌚707.
44 C.J. Municipal Corporations § 3894 et seq.

94-3332. (11505) **Malicious spiking of sawlogs—penalty.** It shall be unlawful for any person to maliciously drive, place or imbed any spike, nail or other metallic substance, stone or rock in any sawlogs intended for manufacture into lumber or other timber products, and any person violating the provisions of this act shall be guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than five years, or by fine not less than one hundred dollars nor more than one thousand dollars, or by both fine and imprisonment.

History: En. Sec. 1, Ch. 66, L. 1917;
re-en. Sec. 11505, R. C. M. 1921. Cal. Pen.
C. Sec. 593a.

Logs and Logging⌚37.
38 C.J. Logs and Logging § 237.

94-3333. (11506) **Defacing public buildings.** Every person who wilfully breaks, defaces or otherwise injures any church, schoolhouse or other public building, or any part thereof, or appurtenance thereto, or the windows or doors of the same, or any book, furniture, ornament or musical instrument or other chattel therein used, is guilty of a misdemeanor.

History: En. Sec. 1075, Pen. C. 1895;
re-en. Sec. 8772, Rev. C. 1907; re-en. Sec.
11506, R. C. M. 1921.

94-3334. (11507) **Injury to trees on public lands.** Every person who commits a trespass on or any injury to any state lands or the improvements thereon, or who, without the proper authority, cuts, fells, girdles, injures or destroys any trees or timber upon any of the school, university or other state lands, or removes or attempts to remove the same, or knowingly purchases or receives such trees or timber, or advises the removal thereof, is guilty of a misdemeanor, and is also liable to the state for three times the value of said trees or timber, or lumber into which the same are converted. All fines collected and all moneys recovered by virtue of this section must be paid into the school fund of the state.

History: Ap. p. Sec. 1, p. 256, L. 1891;
en. Sec. 1076, Pen. C. 1895; re-en. Sec.
8773, Rev. C. 1907; re-en. Sec. 11507,
R. C. M. 1921.

Cross-Reference
Committing waste or trespass on state
lands, penalty, sec. 94-1518.

Public Lands⌚7.
50 C.J. Public Lands § 4.

CHAPTER 34

MAYHEM

Section 94-3401. Mayhem defined.
94-3402. Mayhem—how punishable.

94-3401. (10968) **Mayhem defined.** Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.

History: En. Sec. 42, p. 184, Bannack Stat.; re-en. Sec. 45, p. 277, Cod. Stat. 1871; re-en. Sec. 45, 4th Div. Rev. Stat. 1879; re-en. Sec. 45, 4th Div. Comp. Stat. 1887; amd. Sec. 370, Pen. C. 1895; re-en. Sec. 8304, Rev. C. 1907; re-en. Sec. 10968, R. C. M. 1921. Cal. Pen. C. Sec. 203.

Operation and Effect

A testicle of a male human being is a "member of the body," within the meaning of this section. State v. Sheldon, 54 M 185, 190, 169 P 37.

94-3402. (10969) Mayhem—how punishable. Mayhem is punishable by imprisonment in the state prison not exceeding fourteen years.

History: En. Sec. 42, p. 184, Bannack Stat.; re-en. Sec. 45, p. 277, Cod. Stat. 1871; re-en. Sec. 45, 4th Div. Rev. Stat. 1879; re-en. Sec. 45, 4th Div. Comp. Stat. 1887; en. Sec. 371, Pen. C. 1895; re-en.

References

State v. Benson, 91 M 21, 24, 5 P 2d 223.

Mayhem⇒1.

40 C.J. Mayhem § 3 et seq.

36 Am. Jur. 1, Mayhem and Related Offenses.

Mayhem as dependent on part of body injured and extent of injury. 16 ALR 955.

Mayhem by use of poison or acid. 58 ALR 1328.

Sec. 8305, Rev. C. 1907; re-en. Sec. 10969, R. C. M. 1921. Cal. Pen. C. Sec. 204.

Mayhem⇒7.

40 C.J. Mayhem § 31.

CHAPTER 35

MISCELLANEOUS OFFENSES

Section 94-3501.	Administrator, etc., must file report—penalty.
94-3502.	Adulterating foods, drugs, liquors, etc.
94-3503.	Adulterated candies.
94-3504.	Altering brands.
94-3505.	Apothecary omitting to label drugs or labeling them wrongfully, etc.
94-3506.	Arrests, seizure or levy upon property, dispossession of lands without lawful authority, issuance by justice of the peace of writs or process signed in blank.
94-3507.	Attorneys—misconduct by.
94-3508.	Attorneys—buying demands or suits by.
94-3509.	Attorneys forbidden to defend prosecutions carried on by their partners or formerly by themselves.
94-3510.	Limitation of preceding section.
94-3511.	Barber business—conducting on Sunday.
94-3512.	Penalty.
94-3513.	Boxing or wrestling matches.
94-3514.	Brands—sash or frying pan prohibited.
94-3515.	Branding animals driven through the state.
94-3516.	Branding stock driven into or through state required.
94-3517.	Same—road brand.
94-3518.	Sheep brands.
94-3519.	Penalties.
94-3520.	Duty of officers.
94-3521.	Fines, how disposed of.
94-3522.	Branding cattle running at large.
94-3523.	Bribing members of city or town councils, boards of county commissioners or trustees.
94-3524.	Bringing armed men into the state.
94-3525.	Carrying certain concealed weapons in cities or towns forbidden—punishment.
94-3526.	Carrying certain concealed weapons outside of cities or towns forbidden—punishment.
✓ 94-3527.	Same—who excepted from act.
94-3528.	Arrest without warrant—duty of peace officers.
94-3529.	Concealed weapons—district judge may issue permits to carry.
94-3530.	Definition of concealed weapons.
94-3531.	Definition of unincorporated town.
94-3532.	Jurisdiction of courts.
94-3533.	Common barratry defined—how punished.

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- 94-3534. What proof is required.
- 94-3535. Compounding crimes.
- 94-3536. Compulsory company boarding-houses.
- 94-3537. Same—penalty.
- 94-3538. Consequence of resisting process after a county has been declared in a state of insurrection.
- 94-3539. Contracting or solemnizing incestuous or forbidden marriages.
- 94-3540. Criminal contempt.
- 94-3541. Cruel treatment of lunatics, etc.
- 94-3542. Dead animals—offal, etc.—putting in streets, rivers, etc.
- 94-3543. Deadly weapons—exhibiting in rude, etc., manner or using the same unlawfully.
- 94-3544. Death from explosions, etc.
- 94-3545. Death from collision on railroads.
- 94-3546. Death from mischievous animals.
- 94-3547. Debtor fraudulently concealing his property.
- 94-3548. Defendant fraudulently concealing his property.
- 94-3549. Defacing marks upon logs, lumber or wood.
- 94-3550. Defrauding inn- and hotel-keepers, etc.—penalty.
- 94-3551. Depositing coal slack in streams.
- 94-3552. Same—penalty.
- 94-3553. Disclosing fact of indictment having been found.
- 94-3554. Disclosing what transpired before the grand jury.
- 94-3555. Discharged employees—protection of.
- 94-3556. Deceived employees—action for damages.
- 94-3557. Discrimination by hospitals forbidden.
- 94-3558. Penalty for violation of act.
- 94-3559. Diseased animals.
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- 94-3565. Ditch overflowing on highway.
- 94-3566. Divorce—advertising to procure, forbidden.
- 94-3567. Dogging livestock.
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- 94-3571. Entertainment in establishments licensed to sell beer unlawful.
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- 94-3578. Firing firearms.
- 94-3579. Firearms—use of by children under the age of fourteen years prohibited.
- 94-3580. Liability of parent or guardian.
- 94-3581. Flag—desecration of.
- 94-3582. Meaning of term “flag.”
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- 94-3587. Same—penalty for newspapers accepting advertisement.
- 94-3588. Fraudulent practices to affect the market price.
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- 94-3592. Penalties.
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- 94-35-101. Horses, etc.—taking up or restraining, without owner's consent—penalty.
- 94-35-102. Indians—prohibiting the carrying of firearms by, while off reservation.
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- 94-35-104. Innkeepers and carriers refusing to receive guests.
- 94-35-105. Inspection of mines—penalties—dams and reservoirs, unsafe.
- 94-35-106. Intoxicating liquors—penalty for giving or selling to any person under the age of twenty-one years.
- 94-35-107. "Intoxicating liquor" defined.
- 94-35-108. Intoxicated physicians, acts of.
- 94-35-109. Intoxication of engineers, conductors or drivers of locomotives or cars.
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- 94-35-113. Duplicate receipts must be marked "duplicate."
- 94-35-114. Selling, etc., property received for transportation or storage.
- 94-35-115. Issuing or circulating paper money.
- 94-35-116. Leaving gates open.
- 94-35-117. Logs—permitting to accumulate alongshore forbidden.
- 94-35-118. Same—control of logs on navigable lake.
- 94-35-119. Penalty for violation of act.
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- 94-35-121. Making false return or record of marriage.
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- 94-35-124. Penalty for violation.
- 94-35-125. Mining shafts, drifts or cuts to be covered or fenced, when—penalty.
- 94-35-126. Mining—cages in mines must be cased in.
- 94-35-127. Mining—stoping near shaft.
- 94-35-128. Mining—running cage at excessive speed.
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- 94-35-131. Mining—penalty for obstructing mining shafts, etc.
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- 94-35-134. Penalty.
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- 94-35-139. Obstructing attempts to extinguish fires.
- 94-35-140. Obstructing ford near ferry.
- 94-35-141. Omission of duty by public officer.
- 94-35-142. Offense for which no penalty is prescribed.
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- 94-35-255. Wilfully poisoning food, medicine or water.
- 94-35-256. Workmen—false representation to procure.
- 94-35-257. Same—penalty.

94-3501. (10918) Administrator, etc., must file report—penalty. Any administrator, executor, or guardian, who shall fail to make, render, or file any account, report, or statement in any estate in his charge within the time required by him by law, may be, by the court within which the estate is being administered, summarily punished by a fine in any sum not exceeding one hundred dollars, and may be committed to jail until payment be made, and his letters may be by the court summarily revoked.

History: En. Sec. 272, Pen. C. 1895; Executors and Administrators 467; re-en. Sec. 8254, Rev. C. 1907; re-en. Sec. Guardian and Ward 137.
 10918, R. C. M. 1921. 34 C.J.S. Executors and Administrators § 835; 39 C.J.S. Guardian and Ward §§ 143-145.

94-3502. (11241) Adulterating foods, drugs, liquors, etc. Every person who adulterates or dilutes any article of food, drink, drug, medicine, spirituous or malt liquor or wine, or any article used in compounding them, with a fraudulent intent, to offer the same or cause or permit it to be offered for sale as unadulterated or undiluted, and every person who fraudulently sells, or keeps or offers for sale the same, as unadulterated or undiluted, is guilty of a misdemeanor.

History: En. Sec. 682, Pen. C. 1895; re-en. Sec. 8490, Rev. C. 1907; re-en. Sec. 11241, R. C. M. 1921. Cal. Pen. C. Sec. 382.

Cross-Reference

Selling tainted food, penalty, sec. 94-35-217.

References

Cited or applied as section 682, Penal Code, in *Kelley v. John R. Daily Co.*, 56 M 63, 73, 181 P 326.

Druggists↔12; Food↔12.

28 C.J.S. Druggists §§ 5, 12, 14; 36 C.J.S. Food §§ 21, 22, 26-28.

22 Am. Jur. 871, Food, §§ 84 et seq.

Entrapment to violate Pure Food and Drug Act. 18 ALR 187.

Constitutionality of regulations forbidding adulteration of milk. 18 ALR 244.

Violation of Pure Food Act as "infamous" offense within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 ALR 1016.

Preservative as adulterant within statute in relation to food. 50 ALR 76.

Statutory provisions relating to purity of food products as applicable to foreign substances which get into products as a result of accident or negligence, and not by purpose or design. 98 ALR 1496.

Penal offense predicated upon violation of food law as affected by ignorance or mistake of fact, lack of criminal intent, or presence of good faith. 152 ALR 755.

94-3503. (11265) Adulterated candies. Every person who shall, by himself, his servant or agent, or as the servant or agent of any other person or corporation, manufacture for sale, or knowingly sell or offer to sell, any candy adulterated by the admixture of terra alba, barytes, talc, or any mineral substance, by poisonous colors or flavors or other ingredients deleterious or detrimental to health, is guilty of a misdemeanor.

History: En. Sec. 702, Pen. C. 1895; 8533, Rev. C. 1907; re-en. Sec. 11265, R. amd. Sec. 1, p. 151, L. 1899; re-en. Sec. C. M. 1921. Cal. Pen. C. Sec. 402a.

94-3504. (11211) Altering brands. Every person who marks or brands, alters or defaces the mark or brand, of any horse, mare, colt, jack, jennet, mule, bull, ox, steer, cow, calf, sheep, goat, hog, shoat, or pig, belonging to another, with intent thereby to steal the same, or to prevent identification thereof by the true owner, is punishable by fine not to exceed five hundred dollars, or imprisonment in the state prison not to exceed five years, or both.

History: En. Sec. 67, p. 100, Bannack Stat.; re-en. Sec. 78, p. 284, Cod. Stat. 1871; re-en. Sec. 78, 4th Div. Rev. Stat. 1879; re-en. Sec. 86, 4th Div. Comp. Stat. 1887; amd. Sec. 648, Pen. C. 1895; re-en. Sec. 8459, Rev. C. 1907; re-en. Sec. 11211, R. C. M. 1921. Cal. Pen. C. Sec. 357.

References

State v. Hamilton, 87 M 353, 364, 287 P 933.

Animals↔11, 12.

3 C.J.S. Animals §§ 30, 31.

2 Am. Jur. 714, Animals, §§ 26 et seq.

94-3505. (11238) Apothecary omitting to label drugs or labeling them wrongfully, etc. Every apothecary, druggist, or person carrying on business as a dealer in drugs or medicines, or person employed as clerk or salesman by such person, who, in putting up any drugs or medicines, wilfully, negligently, or ignorantly omits to label the same, or puts an untrue label, stamp, or other designation of contents upon any box, bottle, or other package, containing any drugs or medicines, or substitutes a different article for any article prescribed or ordered, or puts up a greater or less quantity of any article than that prescribed or ordered, or otherwise deviates from the terms of the prescription or order which he undertakes to follow, in consequence of which human life or health is endangered, is guilty of a misdemeanor, or if death ensues, is guilty of a felony.

History: En. Sec. 679, Pen. C. 1895; re-en. Sec. 8487, Rev. C. 1907; re-en. Sec. 11238, R. C. M. 1921. Cal. Pen. C. Sec. 380.

Druggists 12.

28 C.J.S. Druggists §§ 5, 12, 14.

17 Am. Jur. 839, Drugs and Druggists,

§§ 4 et seq.

Constitutionality of statute regulating sale of poisons, drugs or medicines. 54 ALR 730.

94-3506. (10921) Arrests, seizure or levy upon property, dispossession of lands without lawful authority, issuance by justice of the peace of writs or process signed in blank. Every public officer, or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person, or detains him against his will, or seizes or levies upon any property, or dispossesses any one of his lands or tenements, without a regular process or lawful authority therefor, is guilty of a misdemeanor. And any justice of the peace who furnishes or causes to be furnished to any person or corporation engaged in the collection business or to any other person or corporation, a summons or writ of attachment or both, or a supply of summonses or writs of attachments or both, signed by such justice of the peace in blank, and not then signed or issued by him in any suit then filed or pending before him, or who so furnishes or causes to be furnished to any such person or corporation any writ of execution or supply of writs of execution signed in blank, and with the intent and purpose that any such summons or writ of attachment may, at the time of signing and delivery thereof, or thereafter, be used by such person or corporation by themselves dating the same, inserting the name of a party plaintiff and defendant and otherwise completing the same and causing service of any such summons to be made or levy upon and seizure of property to be made under any such writ of attachment, or with the intent and purpose that any such writ of execution so signed and delivered in blank may then or thereafter be utilized by such person or corporation by themselves dating the same and entitling the same in any cause of action in which said justice of the peace has theretofore or may thereafter render judgment, shall be guilty of a misdemeanor and on conviction thereof shall forfeit his office and shall be disqualified from thereafter holding the office of justice of the peace.

History: En. Sec. 275, Pen. C. 1895; re-en. Sec. 8357, Rev. C. 1907; re-en. Sec. 10921, R. C. M. 1921; amd. Sec. 1, Ch. 197, L. 1939. Cal. Pen. C. Sec. 146.

Civil Actions Against Sheriff and County Attorney

Where plaintiff compromised an action against the sheriff and his surety for false arrest and imprisonment by defendants paying \$1,000 to plaintiff, he executing a release of defendants captioned "release in full of all claims", reciting that plaintiff accepted said sum as "complete compensation for all injuries sustained in con-

nection with" the matters set forth in the complaint, then brought a like action against the county attorney who set up the release as a bar, held, that nothing appearing in the release reserving his right to proceed against the county attorney, the court upon sustaining his motion for judgment on the pleadings properly dismissed the action. *Beedle v. Carolan*, 115 M 587, 590, 148 P 2d 559.

False Personation 1; Justices of the Peace 10, 30; Officers 121.

35 C.J.S. False Personation §§ 1, 2; 51 C.J.S. Justices of the Peace §§ 9, 23.

94-3507. (10938) Attorneys—misconduct by. Every attorney who, whether as attorney or as counselor, either:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
2. Wilfully delays his client's suit with a view to his own gain; or,

3. Wilfully receives any money or allowance for or on account of any money which he has not laid out or become answerable for, is guilty of a misdemeanor.

History: En. Sec. 287, Pen. C. 1895; Attorney and Client 33.
re-en. Sec. 8269, Rev. C. 1907; re-en. Sec. 7 C.J.S. Attorney and Client § 59.
10938, R. C. M. 1921. Cal. Pen. C. Sec. 160.

94-3508. (10939) Attorneys—buying demands or suits by. Every attorney who, either directly or indirectly, buys, or is interested in buying, any evidence of debt or thing in an action, with intent to bring suit thereon, is guilty of a misdemeanor.

History: En. Sec. 288, Pen. C. 1895;
re-en. Sec. 8270, Rev. C. 1907; re-en. Sec.
10939, R. C. M. 1921. Cal. Pen. C. Sec. 161.

94-3509. (10940) Attorneys forbidden to defend prosecutions carried on by their partners or formerly by themselves. Every attorney who, directly or indirectly, advises in relation to, or aids, or promotes the defense of any action or proceeding in any court, the prosecution of which is carried on, aided, or promoted by any person as county attorney, or other public prosecutor, with whom such person is directly or indirectly connected as a partner; or who, having himself prosecuted, or in any manner aided or promoted any action or proceeding in any court as county attorney, or other public prosecutor, afterwards, directly or indirectly, advises in relation to, or takes any part in the defense thereof, as attorney or otherwise, or who takes or receives any valuable consideration from or on behalf of any defendant in any such action, upon any understanding or agreement whatever having relation to the defense thereof, is guilty of a misdemeanor, and, in addition to the punishment prescribed therefor, forfeits his license to practice law.

History: En. Sec. 289, Pen. C. 1895;
re-en. Sec. 8271, Rev. C. 1907; re-en. Sec.
10940, R. C. M. 1921. Cal. Pen. C. Sec. 162.

94-3510. (10941) Limitation of preceding section. The preceding section does not prohibit an attorney from defending himself in person, as attorney or counsel, when prosecuted, either civilly or criminally.

History: En. Sec. 290, Pen. C. 1895;
re-en. Sec. 8272, Rev. C. 1907; re-en. Sec.
10941, R. C. M. 1921. Cal. Pen. C. Sec. 163.

94-3511. (11040) Barber business—conducting on Sunday. It is unlawful to conduct the business of hair cutting, shaving, or shampooing, or to open barber shops for the doing of such business, on Sunday.

History: En. Sec. 531, Pen. C. 1895; Sunday 5.
re-en. Sec. 8370, Rev. C. 1907; re-en. Sec. 60 C.J. Sunday § 30.
11040, R. C. M. 1921. Cal. Pen. C. Sec. 300. Constitutionality of discrimination by Sunday law or ordinance as between different kinds of business. 119 ALR 752.

94-3512. (11041) Penalty. Any person violating the provisions of this act is guilty of a misdemeanor and upon conviction thereof shall be fined for the first offense not less than fifteen dollars and not to exceed fifty dollars,

and for any subsequent violation, a fine not less than twenty-five dollars and not exceeding one hundred dollars shall be imposed.

History: En. Sec. 532, Pen. C. 1895; Sunday[⊖]5.
re-en. Sec. 8371, Rev. C. 1907; re-en. Sec. 60 C.J. Sunday § 55 et seq.
11041, R. C. M. 1921.

94-3513. (11296) Boxing or wrestling matches. Every person who engages in, instigates, encourages, or promotes as principal, aid, second, umpire, or otherwise, any boxing, wrestling, or slugging match, with or without gloves, or who attends or is present at such contest, or hires, rents, or permits the use of any building or grounds for such purposes, is guilty of a misdemeanor. This section does not apply to boxing with soft gloves in any gymnasium for exercise.

History: En. Sec. 752, Pen. C. 1895;
re-en. Sec. 8576, Rev. C. 1907; re-en. Sec.
11296, R. C. M. 1921.

NOTE.—See sections 82-301 to 82-311 relating to licensing of athletic contests.

Cross-Reference

Prizefights, secs. 94-35-163 to 94-35-165.

Operation and Effect

To hold that the provisions of this section relating to wrestling and slugging matches were intended to be repealed by chapter 97, act of 1913, known as the Kiley law, would be to give countenance to repeals by implication, inasmuch as the

latter deals only with boxing contests, which it sanctions, but it does not touch the provisions of this section, which prohibits wrestling and slugging matches. State ex rel. Esgar v. District Court, 56 M 464, 467, 185 P 157.

Id. The Kiley law permitting boxing matches, which was referred to and rejected by the people, did not repeal this section.

References

Cited or applied as section 8576, Revised Codes, in Brown v. Independent Publishing Co., 48 M 374, 379, 138 P 258; State ex rel. O'Rourke v. District Court, 56 M 476, 477, 185 P 157.

94-3514. (11554) Brands—sash or frying pan prohibited. Every person who for the purpose of branding horses, cattle, sheep, goats or any other animal, uses as a brand, a sash, frying pan or any device whatsoever, which can be employed or used to obliterate a brand, and every person who shall use any unrecorded brand which is an infringement upon any recorded brand, or who shall use a like brand in the same position or place recorded by another, is punishable by a fine not exceeding two hundred dollars, or imprisonment in the county jail not exceeding sixty days, or both.

History: En. Sec. 1190, Pen. C. 1895; Animals[⊖]12.
amd. Sec. 1, Ch. 125, L. 1903; re-en. Sec. 3 C.J.S. Animals § 30.
8864, Rev. C. 1907; re-en. Sec. 11554, R.
C. M. 1921.

94-3515. (11542) Branding animals driven through the state. Every person who owns or has charge of any horses, cattle or sheep which are driven into or through any part of this state, and fails to plainly brand or mark the animals so driven, so that such animals may be readily distinguished from other animals, is punishable by a fine not exceeding three hundred dollars.

History: En. Sec. 1178, Pen. C. 1895; Animals[⊖]6.
re-en. Sec. 8851, Rev. C. 1907; re-en. Sec. 3 C.J.S. Animals §§ 24, 25.
11542, R. C. M. 1921. 2 Am. Jur. 714, Animals, §§ 26 et seq.

94-3516. (11543) Branding stock driven into or through state required. All droves of horses, mules, cattle or sheep which may hereafter be driven from any other state or territory of the United States or any foreign

country, into or through any county or counties of this state, shall be plainly branded or marked with one uniform brand or mark.

History: En. Sec. 1, p. 54, L. 1893; 8852, Rev. C. 1907; re-en. Sec. 11543, R. re-en. Sec. 1179, Pen. C. 1895; re-en. Sec. C. M. 1921.

94-3517. (11544) Same—road brand. All such horses, mules and cattle shall be so branded with one distinct ranch or road brand of the owner or owners so as to show distinctly in such place or places as the owner may adopt.

History: En. Sec. 2, p. 54, L. 1893; 8853, Rev. C. 1907; re-en. Sec. 11544, R. re-en. Sec. 1180, Pen. C. 1895; re-en. Sec. C. M. 1921.

94-3518. (11545) Sheep brands. All such sheep shall be marked distinctly with such mark or device as may be sufficient to distinguish the same readily should they become intermixed or mingled with other flocks of sheep in this state.

History: En. Sec. 3, p. 54, L. 1893; 8854, Rev. C. 1907; re-en. Sec. 11545, R. re-en. Sec. 1181, Pen. C. 1895; re-en. Sec. C. M. 1921.

94-3519. (11546) Penalties. Any such owner or owners, person or persons in charge of such drove of stock which may be driven into or through this state, who shall fail to comply with the provisions of this act, shall be fined in a sum not less than fifty dollars nor more than three hundred dollars, together with costs of suit.

History: En. Sec. 4, p. 54, L. 1893; Animals↪13.
re-en. Sec. 1182, Pen. C. 1895; re-en. Sec. 3 C.J.S. Animals § 33.
8855, Rev. C. 1907; re-en. Sec. 11546, R.
C. M. 1921.

94-3520. (11547) Duty of officers. It shall be the special duty of the county attorney, sheriff, and any constable of each and every county in this state, to enforce the provisions of this act.

History: En. Sec. 5, p. 54, L. 1893; Sheriffs and Constables↪86.
re-en. Sec. 1183, Pen. C. 1895; re-en. Sec. 57 C.J. Sheriffs and Constables § 135
8856, Rev. C. 1907; re-en. Sec. 11547, R. et seq.
C. M. 1921.

94-3521. (11548) Fines, how disposed of. All fines collected under the provisions of this act, shall be paid into the general school fund of the county in which judgment therefor is recovered.

History: En. Sec. 6, p. 54, L. 1893; Fines↪20.
re-en. Sec. 1184, Pen. C. 1895; re-en. Sec. 36 C.J.S. Fines § 19.
8857, Rev. C. 1907; re-en. Sec. 11548, R.
C. M. 1921.

94-3522. (11553) Branding cattle running at large. Every person save only an owner, and he only when branding on his own premises and in the presence of two responsible citizens, who marks or brands any calf or cattle that are running at large between the first day of December, and the tenth day of May of the next ensuing year; and every person who shall at any time brand or cause to be branded or marked, any horse, mule, cattle or head of cattle, sheep, swine, or other animal, one year old or older, with any piece of metal or implement, other than a branding-iron, which branding-iron shall be of the same design as the brand or mark owned by the party using it; or who shall so mark or brand, or cause to be marked or branded any of the animals aforesaid with any piece or pieces

of iron called "running irons," such as bars, rings, half or quarter circles; is punishable by imprisonment in the county jail for not exceeding six months, or by a fine of not less than twenty-five dollars, nor more than five hundred dollars, or both.

History: En. Sec. 1189, Pen. C. 1895; re-en. Sec. 8863, Rev. C. 1907; re-en. Sec. 11553, R. C. M. 1921.

Animals⁶.

3 C.J.S. Animals §§ 24, 25.

2 Am. Jur. 714, Animals, §§ 26 et seq.

94-3523. (10943) Bribing members of city or town councils, boards of county commissioners or trustees. Every person who gives or offers a bribe to any member of any city or town council, board of county commissioners, or board of trustees of any county, city, or corporation, with intent to corruptly influence such member in his action on any matter or subject pending before the body of which he is a member, and every member of any of the bodies mentioned in this section who receives, or offers to receive, any such bribe, is punishable by imprisonment in the state prison for a term not less than one nor more than fourteen years, and is disqualified from holding any office in this state.

History: En. Sec. 292, Pen. C. 1895; re-en. Sec. 8274, Rev. C. 1907; re-en. Sec. 10943, R. C. M. 1921. Cal. Pen. C. Sec. 165.

Criminal offense of bribery as affected by lack of legal qualification of person assuming to be an officer. 115 ALR 1263.

Officer's lack of authority as affecting offense of bribery. 122 ALR 951.

Bribery¹ (1).

11 C.J.S. Bribery §§ 1, 2.

See generally, 8 Am. Jur. 885, Bribery.

Predicating bribery or cognate offense upon unaccepted offer by or to an official. 52 ALR 816.

Bribery as affected by nonexistence of duty upon part of official to do, or refrain from doing, the act in respect of which it was sought to influence him. 158 ALR 323.

94-3524. (11315) Bringing armed men into the state. Every person who brings into this state an armed person or armed body of men for the preservation of the peace or the suppression of domestic violence, except at the solicitation and by the permission of the legislative assembly or of the governor, is punishable by imprisonment in the state prison not exceeding ten years and by a fine not exceeding ten thousand dollars.

History: En. Sec. 759, Pen. C. 1895; re-en. Sec. 8591, Rev. C. 1907; re-en. Sec. 11315, R. C. M. 1921.

Insurrection and Sedition².

46 C.J.S. Insurrection and Sedition § 3.

94-3525. (11302) Carrying certain concealed weapons in cities or towns forbidden—punishment. Every person who, within the limits of any city or town, carries or bears concealed upon his person a dirk, dagger, pistol, revolver, slingshot, swordcane, billy, knuckles made of any metal or hard substance, knife having a blade four inches long or longer, razor, not including a safety razor, or other deadly weapon, shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the county jail for a period not exceeding six months, or by both such fine and imprisonment, or may be punished by imprisonment in the state penitentiary for a period not exceeding five years.

History: Earlier acts were Sec. 1, p. 62, L. 1883; re-en. Sec. 66, 4th Div. Comp. Stat. 1887; amd. Sec. 758, Pen. C. 1895; re-en. Sec. 8582, Rev. C. 1907; amd. Sec. 1, Ch. 58, L. 1911.

This section en. Sec. 1, Ch. 74, L. 1919; re-en. Sec. 11302, R. C. M. 1921.

References

Cited or applied as section 8582, Revised Codes, before amendment, in State ex rel. Powers v. Dale, 47 M 227, 230, 131 P 670.

Weapons—6-10.

68 C.J. Weapons § 11 et seq.

56 Am. Jur. 995, Weapons and Firearms,

§§ 9 et seq.

94-3526. (11303) Carrying certain concealed weapons outside of cities or towns forbidden—punishment. Every person who, without the limits of any city or town, carries or bears concealed upon his person a dirk, dagger, pistol, revolver, slingshot, swordcane, billy, knuckles made of any metal or hard substance, knife having a blade four inches long or longer, razor, not including a safety razor not capable of being used as an ordinary razor, or other deadly weapon, shall be punished by imprisonment in the county jail for a term not less than six months nor more than one year, or by a fine of not less than twenty-five dollars nor more than three hundred dollars, or by both such fine and imprisonment.

History: Earlier acts were Sec. 1, Ch. 35, L. 1903; re-en. Sec. 8583, Rev. C. 1907. This section en. Sec. 2, Ch. 74, L. 1919; re-en. Sec. 11303, R. C. M. 1921.

References

State v. Hodge, 84 M 24, 30, 273 P 1049.

56 Am. Jur. 995, Weapons and Firearms, §§ 9 et seq.

94-3527. (11304) Same—who excepted from act. The preceding sections shall not apply to:

1. A sheriff or his deputy;
2. A marshal or his deputy;
3. A constable or his deputy;
4. A police officer or policeman;
5. A United States marshal or his deputy;
6. A person in the secret service of the United States;
7. A game warden or his deputy;
8. A U. S. forest reserve official or his deputy;
9. A person in actual service as a national guardsman;
10. A revenue officer or his deputy;
11. A person summoned to the aid of either of the foregoing named persons;
12. A civil officer or his deputy engaged in the discharge of official business;
13. A person authorized by a judge of a district court of this state to carry a weapon;
14. The carrying of arms on one's own premises or at his home or place of business;
15. Any peace officer of the state of Montana.

History: En. Sec. 3, Ch. 74, L. 1919; re-en. Sec. 11304, R. C. M. 1921.

References

State v. Hodge, 84 M 24, 30, 273 P 1049.

94-3528. (11305) Arrest without warrant—duty of peace officers. Any person violating any of the provisions of sections 94-3525 and 94-3526 may be arrested without warrant by any peace officer and lodged in a town, city, or county jail; and any peace officer who shall fail or refuse to arrest such person on his own knowledge, or upon information from some credible person, shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars.

History: En. Sec. 4, Ch. 74, L. 1919; re-en. Sec. 11305, R. C. M. 1921.

Arrest—63 (3).

6 C.J.S. Arrest § 6.

94-3529. (11306) Concealed weapons—district judge may issue permits to carry. Any judge of a district court of this state may grant permission to carry or bear concealed or otherwise a pistol or revolver for a term not exceeding one year. All applications for such permission must be made by petition filed with the clerk of the district court, for the filing of which petition no charge shall be made. The applicant shall, if personally unknown to the judge, furnish proof by a credible witness of his good moral character and peaceable disposition. No such permission shall be granted any person who is not a citizen of the United States and who has not been an actual bona fide resident of the state of Montana for six months immediately next preceding the date of such application. A record of permission granted shall be kept by the clerk of the court, which record shall state the date of the application, the date of the permission, the name of the person to whom permission is granted, the name of the judge granting the permission, the name of the person, if any, by whom good moral character and peaceable disposition are proved, and which record must be signed by person who is granted such permission. The clerk shall thereupon issue under his hand and the seal of the court a certificate, in a convenient card form so that the same may be carried in the pocket, stating:

"Permission toauthorizing him to carry or bear concealed or otherwise a pistol or revolver for the period of..... from the date hereof, has been granted by....., a judge of the district court of the.....judicial district of the state of Montana, in and for the county of.....

"Witness the hand of the clerk and the seal of said court this..... day of....., 19.....

.....
Clerk."

The date of the certificate shall be the date of the granting of such permission. The certificate shall bear upon its face the signature of the person receiving the same. Upon good cause shown the judge granting such permission may, and in his discretion without notice to the person receiving such permission, revoke the same, the date of the revocation being noted by the clerk upon the record kept by him.

All permissions to carry or bear concealed weapons heretofore granted are hereby revoked.

History: En. Sec. 5, Ch. 74, L. 1919;
re-en. Sec. 11306, R. C. M. 1921.

94-3530. (11307) Definition of concealed weapons. Concealed weapons shall mean any weapon mentioned in the foregoing sections, which shall be wholly or partially covered by the clothing or wearing apparel of the person so carrying or bearing the weapon.

History: En. Sec. 6, Ch. 74, L. 1919; Weapons \hookrightarrow 8.
re-en. Sec. 11307, R. C. M. 1921. 68 C.J. Weapons § 1.

94-3531. (11308) Definition of unincorporated town. A town, if unincorporated, within the meaning of this act, shall consist of at least ten

dwellings situated so that no one of said buildings is distant from another more than one hundred yards.

History: En. Sec. 7, Ch. 74, L. 1919;
re-en. Sec. 11308, R. C. M. 1921.

94-3532. (11309) Jurisdiction of courts. The district courts shall have original jurisdiction in all criminal actions for violations of the provisions of this act.

History: En. Sec. 8, Ch. 74, L. 1919; Criminal Law 92.
re-en. Sec. 11309, R. C. M. 1921. 22 C.J.S. Criminal Law § 127.

94-3533. (10936) Common barratry defined—how punished. Common barratry is the practice of exciting groundless judicial proceedings, and is punishable by imprisonment in the county jail not exceeding six months, and by fine not exceeding five hundred dollars.

History: En. Sec. 285, Pen. C. 1895; 9 C.J.S. Barratry §§ 1, 2; 14 C.J.S.
re-en. Sec. 8267, Rev. C. 1907; re-en. Sec. Champerty and Maintenance § 61.
10936, R. C. M. 1921. Cal. Pen. C. Sec. 158. 10 Am. Jur. 551, Champerty and Maintenance, § 3.

Champerty and Maintenance 9.

Offense of barratry; criminal aspects of champerty and maintenance. 139 ALR 620.

94-3534. (10937) What proof is required. No person can be convicted of common barratry except upon proof that he has excited suits or proceedings at law in at least three instances, and with a corrupt and malicious intent to vex and annoy.

History: En. Sec. 286, Pen. C. 1895; Champerty and Maintenance 10.
re-en. Sec. 8268, Rev. C. 1907; re-en. Sec. 9 C.J.S. Barratry §§ 1, 3; 14 C.J.S.
10937, R. C. M. 1921. Cal. Pen. C. Sec. 159. Champerty and Maintenance § 62.

94-3535. (10931) Compounding crimes. Every person who, having knowledge of the actual commission of a crime, takes money or property of another, or any gratuity or reward, or any engagement, or promise thereof, upon any agreement or understanding to compound or conceal such crime, or to abstain from any prosecution thereof, or to withhold any evidence thereof, except in cases provided for by law, in which crimes may be compromised by leave of court, is punishable as follows:

1. By imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year, where the crime was punishable by death or imprisonment in the state prison for life.

2. By imprisonment in the state prison not exceeding three years, or in the county jail not exceeding six months, where the crime was punishable by imprisonment in the state prison for any other term than for life.

3. By imprisonment in the county jail not exceeding six months, or by fine not exceeding five hundred dollars, where the crime was a misdemeanor.

History: Ap. p. Sec. 108, p. 203, Bannack Stat.; re-en. Sec. 120, p. 296, Cod. Stat. 1871; re-en. Sec. 120, 4th Div. Rev. Stat. 1879; re-en. Sec. 129, 4th Div. Comp. Stat. 1887; en. Sec. 280, Pen. C. 1895; re-en. Sec. 8262, Rev. C. 1907; re-en. Sec. 10931, R. C. M. 1921. Cal. Pen. C. Sec. 153.

References

Portland Cattle Loan Co. v. Featherly, 74 M 531, 547, 241 P 322; In re McCue, 80 M 537, 558, 261 P 341.

Compounding Offenses 1.

15 C.J.S. Compounding Offenses §§ 1, 3.

94-3536. (11223) Compulsory company boarding-houses. It shall be unlawful for any person, firm, company, or corporation now operating or

who shall hereafter operate a boarding-house in connection with their general business, either directly or through others, to compel an employee to board in such boarding-house against his will.

History: En. Sec. 1, Ch. 102, L. 1903; Master and Servant \S 84.
re-en. Sec. 8472, Rev. C. 1907; re-en. Sec. 39 C.J. Master and Servant \S 56 et seq.
11223, R. C. M. 1921.

94-3537. (11224) Same—penalty. Any person, firm, company, or corporation violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars.

History: En. Sec. 2, Ch. 102, L. 1903;
re-en. Sec. 8473, Rev. C. 1907; re-en. Sec.
11224, R. C. M. 1921.

94-3538. (11292) Consequence of resisting process after a county has been declared in a state of insurrection. A person who, after the publication of the proclamation authorized by section 94-5312, resists or aids in resisting the execution of process in any county declared to be in a state of insurrection, or who aids or attempts the rescue or escape of another from lawful custody or confinement, or who resists or aids in resisting any force ordered out by the governor to quell or suppress an insurrection, is punishable by imprisonment in the state prison not less than two years.

History: En. Sec. 748, Pen. C. 1895; Obstructing Justice \S 3.
re-en. Sec. 8572, Rev. C. 1907; re-en. Sec. 46 C.J. Obstructing Justice \S 17 et seq.
11292, R. C. M. 1921. Cal. Pen. C. Sec. 411.

94-3539. (11212) Contracting or solemnizing incestuous or forbidden marriages. Every person authorized to solemnize marriage, who wilfully and knowingly solemnizes any incestuous or other marriage forbidden by law, is punishable by a fine not less than one hundred nor more than one thousand dollars, or imprisonment in the county jail not less than one year nor more than two years, or both.

History: En. Sec. 649, Pen. C. 1895; **Cross-Reference**
re-en. Sec. 8460, Rev. C. 1907; re-en. Sec. Solemnizing when involving miscegenation, sec. 48-110.
11212, R. C. M. 1921. Cal. Pen. C. Sec. 359.

Marriage \S 27.
38 C.J. Marriage \S 84.

94-3540. (10944) Criminal contempt. Every person guilty of any contempt of court, of any of the following kinds, is guilty of a misdemeanor:

1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Behavior of the like character committed in the presence of any referee, while actually engaged in any trial or hearing, pursuant to the order of any court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceedings authorized by law.

3. Any breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of any court.

4. Wilful disobedience of any process or order lawfully issued by any court.

5. Resistance wilfully offered by any person to the lawful order or process of any court.

6. The contumacious and unlawful refusal of any person to be sworn as a witness; or, when so sworn, the like refusal to answer any material question.

7. The publication of a false or grossly inaccurate report of the proceedings of any court.

8. Presenting to any court having power to pass sentence upon any prisoner under conviction, or to any member of such court, any affidavit, or testimony, or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon such prisoner, except as provided in this code.

History: En. Sec. 293, Pen. C. 1895; re-en. Sec. 8275, Rev. C. 1907; re-en. Sec. 10944, R. C. M. 1921. Cal. Pen. C. Sec. 166.

Constitutionality

Although a citizen has the right to publish decisions of the supreme court, comment upon them freely and discuss their correctness, he has no right to destroy public confidence in the court and dispose the community to disregard its order or judgments by false and defamatory publications, such conduct constituting an abuse of the liberty of the press, against the contention that contempt proceedings against the press invade the constitutional right of freedom of speech, Art. III, Sec. 10 Const. In re Nelson et al., 103 M 43, 57, 60 P 2d 365.

Subd. 7. Cause Must Be Pending in Contempt

While any false or grossly inaccurate report of the proceedings of a court published is punishable as a misdemeanor under this section, such publication is punishable as a contempt of court only when published while the cause is still pending. In re Nelson et al., 103 M 43, 54, 60 P 2d 365.

"Report of the Proceedings of a Court"

The publication of an editorial referring to decisions of the supreme court in certain cases, and charging the court with dealing out injustice in such cases and entering into a "dirty deal" in order to do so, constitutes a report of the proceedings of a court within subdivision 7 of this section. State ex rel. Haskell v. Faulds, 17 M 140, 142, 42 P 285.

Criminal and Civil Contempt Distinguished

A criminal contempt is conduct that is directed against the dignity and authority of the court; a civil contempt consists in failing to do something ordered to be done

by a court in a civil action for the benefit of the opposing party therein, and is therefore not an offense against the dignity of the court but against the party in whose behalf the violated order is made. Contempts prosecuted to preserve or restore the rights of private parties are civil and remedial in their nature. Pelletier v. Glacier County, 107 M 221, 226, 82 P 2d 595.

Direct and Constructive Contempts Distinguished

A direct contempt is an open insult committed in the presence of the court; and a constructive contempt is an act done not in the presence of the court but at a distance, which tends to belittle, to degrade or to obstruct, interrupt, prevent or embarrass the administration of justice. Pelletier v. Glacier County, 107 M 221, 226, 82 P 2d 595.

False Report on Dissenting Opinion

Contemptuous language published by a newspaper concerning a dissenting opinion does not constitute contempt of court, since it is the view of an individual justice and not the opinion of the court, but if the language be libelous, the remedy is a civil or criminal action for libel. In re Nelson et al., 103 M 43, 64, 60 P 2d 365.

Nature of Contempt

Proceedings in contempt are of a criminal nature. State ex rel. B. & M. Co. v. Judges, 30 M 193, 198, 76 P 10.

Operation and Effect

One guilty of a contempt of court by a wilful disobedience of an injunction order lawfully issued, concerning the use of water, may be punished under this section as for a misdemeanor. State ex rel. Flynn v. District Court, 24 M 33, 35, 60 P 493.

Acts constituting contempts are referred to in this section, which are not mentioned in section 93-9801. State ex rel. Metcalf v. District Court, 52 M 46, 48, 155 P 278.

The publication of an article in a newspaper, in effect charging a district judge with wrongdoing in connection with his decision in a cause disposed of by him six months before, did not constitute contempt of court under this section, but fell within the constitutional provision guaranteeing the liberty of the press, for the violation of which privilege the law provides redress for libel by civil, or punishment by criminal action. *State ex rel. Metcalf v. District Court*, 52 M 46, 54, 155 P 278.

Power to Punish for Contempt as Such Not Abrogated

Although the publication of a contemptuous report of the proceedings of a court is punishable as a misdemeanor, this does not deprive the court of the power to punish such act as a contempt. *State ex rel. Haskell v. Faulds*, 17 M 140, 148, 42 P 285.

Power to Punish for Contempt is Inherent in the Courts

The power to punish for contempt is inherent in the courts of record of this state, is a part of their very life, and a necessary incident to the exercise of judicial functions. It exists independently of statutes, and cannot be taken away or so far abridged by the legislature as to leave such courts without proper and vigorous means of protecting themselves from insult or actually enforcing their lawful orders. *Territory v. Murray*, 7 M 251, 257, 15 P 145; *State ex rel. B. & M. Co. v. Judges*, 30 M 193, 200, 76 P 10; *In re Mettler*, 50 M 299, 302, 146 P 747; *State ex rel. Metcalf v. District Court*, 52 M 46, 48, 155 P 278.

Contempt—1 et seq.
17 C.J.S. *Contempt* § 5 et seq.
12 Am. Jur. 387, *Contempt*.

94-3541. (11214) Cruel treatment of lunatics, etc. Every person guilty of any harsh, cruel, or unkind treatment or any neglect of duty towards any idiot, lunatic, or insane person, is guilty of a misdemeanor.

History: En. Sec. 651, Pen. C. 1895; re-en. Sec. 8462, Rev. C. 1907; re-en. Sec. 11214, R. C. M. 1921. Cal. Pen. C. Sec. 361.

Assault and Battery—2.
6 C.J.S. *Assault and Battery* §§ 7, 12.

94-3542. (11235) Dead animals—offal, etc.—putting in streets, rivers, etc. Every person who puts the carcass of any dead animal, or the offal from any slaughter-pen, corral, or butcher-shop, into any river, creek, pond, or reservoir, stream, street, alley, public highway, or road in common use, or who attempts to destroy the same by fire within one-fourth mile of any city, town, or village, and every person who puts the carcass of any dead animal, or any offal of any kind, in or upon the borders of any stream, pond, lake, or reservoir, from which water is drawn for the supply of the inhabitants of any city or town in this state, so that the drainage from such carcass or offal may be taken up by or in such stream, pond, lake, or reservoir, or who allows the carcass of any dead animal, or any offal of any kind, to remain in or upon the borders of any such stream, pond, lake, or reservoir within the boundaries of any land owned or occupied by him, or who keeps any horses, mules, cattle, swine, sheep, or livestock of any kind penned, corralled, or housed on, over, or on the borders of any such stream, pond, lake, or reservoir, so that the waters thereof shall become polluted by reason thereof, is guilty of a misdemeanor, and upon conviction thereof shall be punished as prescribed in section 94-3599.

History: En. Sec. 676, Pen. C. 1895; re-en. Sec. 8484, Rev. C. 1907; re-en. Sec. 11235, R. C. M. 1921. Cal. Pen. C. Sec. 374.

94-3543. (11299) Deadly weapons—exhibiting in rude, etc., manner or using the same unlawfully. Every person who, not in necessary self-defense, in the presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry, and threatening manner, or who in any manner unlawfully uses the same in any fight or quarrel, is guilty of a misdemeanor.

History: Earlier acts were Sec. 39, p. 183, Bannack Stat.; re-en. Sec. 62, p. 279, Cod. Stat. 1871; re-en. Sec. 62, 4th Div. Rev. Stat. 1879; amd. Sec. 1, p. 74, L. 1885; re-en. Sec. 65, 4th Div. Comp. Stat. 1887.

This section en. Sec. 755, Pen. C. 1895; re-en. Sec. 8579, Rev. C. 1907; re-en. Sec. 11299, R. C. M. 1921. Cal. Pen. C. Sec. 417.

Weapons⌚14.

68 C.J. Weapons § 66 et seq.

See 4 Am. Jur. 144, Assault and Battery, §§ 33 et seq.; 56 Am. Jur. 994, Weapons and Firearms, §§ 6 et seq.

Firearm used as a bludgeon as a deadly weapon. 8 ALR 1319.

Cane as a deadly weapon. 30 ALR 815.

Unloaded firearm as a dangerous weapon. 74 ALR 1206.

Tear-gas gun as dangerous or deadly weapon within statute inhibiting the carrying of dangerous weapons. 92 ALR 1098.

94-3544. (11229) Death from explosions, etc. Every person having charge of a steam-boiler or steam-engine, or other apparatus for generating or employing steam, used in any manufactory, or on a railroad, or in any vessel, or in any kind of mining, milling, or mechanical works, who wilfully, or from ignorance or neglect, creates or allows to be created such an undue quantity of steam as to burst or break the boiler, engine, or apparatus, or to cause any other accident whereby the death of a human being is produced, is punishable by imprisonment in the state prison for not less than one nor more than ten years.

History: En. Sec. 670, Pen. C. 1895; re-en. Sec. 8478, Rev. C. 1907; re-en. Sec. 11229, R. C. M. 1921. Cal. Pen. C. Sec. 368.

Steam⌚1.

60 C.J. Steam § 16 et seq.

94-3545. (11230) Death from collision on railroads. Every conductor, engineer, brakeman, switchman, or other person having charge, wholly or in part, of any railroad car, locomotive, or train, who wilfully or negligently suffers or causes the same to collide with another car, locomotive, or train, or with any other object or thing, whereby the death of a human being is produced, is punishable by imprisonment in the state prison for not less than one nor more than ten years.

History: En. Sec. 671, Pen. C. 1895; re-en. Sec. 8479, Rev. C. 1907; re-en. Sec. 11230, R. C. M. 1921. Cal. Pen. C. Sec. 369.

Railroads⌚255 (3).

51 C.J. Railroads § 1111 et seq.

94-3546. (11260) Death from mischievous animals. If the owner of a mischievous animal, knowing its propensities, wilfully suffers it to go at large, or keeps it without ordinary care, and such animal while so at large, or while not kept with ordinary care, kills any human being who has taken all the precautions which the circumstances permitted, or which a reasonable person would ordinarily take in the same situation, is guilty of a felony.

History: En. Sec. 697, Pen. C. 1895; re-en. Sec. 8528, Rev. C. 1907; re-en. Sec. 11260, R. C. M. 1921.

Animals⌚57.

3 C.J.S. Animals §§ 141, 236, 237, 239, 246-254.

94-3547. (10932) Debtor fraudulently concealing his property. Every debtor who fraudulently removes his property or effects out of this state, or fraudulently sells, conveys, assigns, or conceals his property, with intent to defraud, hinder, or delay his creditors of their rights, claims, or demands, is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or both.

History: En. Sec. 281, Pen. C. 1895; re-en. Sec. 8263, Rev. C. 1907; re-en. Sec. 10932, R. C. M. 1921. Cal. Pen. C. Sec. 154.

Fraudulent Conveyances⌚329.

37 C.J.S. Fraudulent Conveyances §§ 466, 469.

94-3548. (10933) Defendant fraudulently concealing his property. Every person against whom an action is pending, or against who a judgment has been rendered for the recovery of any personal property, who fraudulently conceals, sells, or disposes of such property, with intent to hinder, delay, or defraud the person bringing such action or recovering such judgment, or with such intent removes such property beyond the limits of the county in which it may be at the time of the commencement of such action or the rendering of such judgment, is punishable as provided in the preceding section.

History: En. Sec. 282, Pen. C. 1895; re-en. Sec. 8264, Rev. C. 1907; re-en. Sec. 10933, R. C. M. 1921. Cal. Pen. C. Sec. 155.

94-3549. (11210) Defacing marks upon logs, lumber or wood. Every person who cuts out, alters, or defaces any mark made upon any log, lumber, or wood, or puts a false mark thereon, with intent to prevent the owner from discovering its identity, is guilty of a misdemeanor.

History: En. Sec. 647, Pen. C. 1895; re-en. Sec. 8458, Rev. C. 1907; re-en. Sec. 11210, R. C. M. 1921. Cal. Pen. C. Sec. 356. Logs and Logging 37. 38 C.J. Logs and Logging § 237.

94-3550. (11579) Defrauding inn- and hotel-keepers, etc.—penalty. Any person who shall put up at any inn or hotel, restaurant, cafe, apartment, rooming- or boarding-house, or hospital, and who shall (except where credit is given by agreement) procure any food, entertainment or accommodation without paying therefor and with intent to cheat and defraud the owner or keeper thereof out of his pay for same, or who, with intent to cheat and defraud such owner or keeper out of the pay thereof, shall obtain credit at any hotel or inn, restaurant, cafe, apartment, rooming- or boarding-house or hospital for such food, entertainment or accommodation by means of any false show of baggage or effects brought thereto, or shall with such intent remove or cause to be removed any baggage or effects from any hotel or inn, restaurant, cafe, apartment, rooming- or boarding-house, or hospital, where there is a lien existing thereon for the proper charges due from such guest for fare and board furnished therein shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment not exceeding three months or by fine not exceeding one hundred dollars and costs, or both such fine and imprisonment.

History: En. Sec. 2514, Civ. C. 1895; re-en. Sec. 5177, Rev. C. 1907; amd. Sec. 1, Ch. 9, L. 1917; re-en. Sec. 11579, R. C. M. 1921. Cal. Pen. C. Sec. 537.

References

Saner v. Bowker, 69 M 463, 467, 222 P 1056.

Cross-Reference

Defrauding hotel, penalty, sec. 34-112.

Innkeepers 16.

43 C.J.S. Innkeepers § 28.

28 Am. Jur. 648, Innkeepers, §§ 151, 152.

94-3551. (11276) Depositing coal slack in streams. All persons owning or having in operation, and all persons who may hereafter own or put in operation in the state of Montana, either in person or by agent, any coal mine on any stream containing fish or water which is used for domestic purposes, or for irrigation, are hereby required to so care for any coal slack or other refuse emanating from such coal mining operation as to prevent the same from mingling with the waters of such streams.

History: En. Sec. 1, p. 165, L. 1901; amd. Sec. 1, Ch. 6, L. 1903; re-en. Sec. 8557, Rev. C. 1907; re-en. Sec. 11276, R. C. M. 1921.

Waters and Water Courses 50.
67 C.J. Waters §§ 14 et seq., 123.

94-3552. (11277) Same—penalty. All persons owning or operating, or who may hereafter own or operate any coal mine on any stream containing fish or water which is used for domestic purposes, or for irrigation, who shall dump, cart, or deposit, or cause or suffer to be deposited, in such stream any such coal slack or other refuse emanating from such coal-mining operation, shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any court of competent jurisdiction, shall be fined in any sum not less than two hundred dollars nor more than five hundred dollars for each and every offense.

History: En. Sec. 1, p. 165, L. 1901; 8558, Rev. C. 1907; re-en. Sec. 11277, R. re-en. Sec. 2, Ch. 6, L. 1903; re-en. Sec. C. M. 1921.

94-3553. (10946) Disclosing fact of indictment having been found. Every grand juror, county attorney, clerk, judge, or other officer who, except by issuing or in executing a warrant of arrest, wilfully discloses the fact of an indictment having been found or information filed for a felony, until the defendant has been arrested, is guilty of a misdemeanor.

History: En. Sec. 295, Pen. C. 1895; re-en. Sec. 8277, Rev. C. 1907; re-en. Sec. 10946, R. C. M. 1921. Cal. Pen. C. Sec. 168.

14 C.J.S. Clerks of Courts §§ 80-82; 27 C.J.S. District and Prosecuting Attorneys § 17; 48 C.J.S. Judges § 71; 46 C.J. Officers § 346 et seq.

Clerks of Courts 76; District and Prosecuting Attorneys 11; Judges 38; Officers 121.

94-3554. (10947) Disclosing what transpired before the grand jury. Every grand juror who, except when required by a court, wilfully discloses any evidence adduced before the grand jury, or anything which he himself, or any other member of the grand jury, may have said, or in what manner he or any other member of the grand jury may have voted on a matter before them, is guilty of a misdemeanor.

History: En. Sec. 296, Pen. C. 1895; re-en. Sec. 8278, Rev. C. 1907; re-en. Sec. 10947, R. C. M. 1921. Cal. Pen. C. Sec. 169.

Grand Jury 41.
38 C.J.S. Grand Juries § 43.

94-3555. (11219) Discharged employees—protection of. Every person who violates any of the provisions of sections 41-1309 to 41-1311, relating to the protection of discharged employees, and the prevention of blacklisting, is guilty of a misdemeanor.

History: En. Sec. 656, Pen. C. 1895; re-en. Sec. 8467, Rev. C. 1907; re-en. Sec. 11219, R. C. M. 1921.

Master and Servant 18.
39 C.J. Master and Servant § 35 et seq.

94-3556. (11222) Deceived employees—action for damages. Any workman of this state or any workman of any state who has been or shall be influenced, induced, or persuaded to engage with any person mentioned in section 94-35-256, through or by means of any of the things prohibited by this act, shall have a right of action for recovery of all damages that he has sustained in consequence of the deception, misrepresentation, and false advertising used to induce him to change his place of employment, against any person, corporation, company, or association directly or indirectly procur-

ing such change, and in addition thereto, he shall recover reasonable attorney's fees to be fixed by the court and taxed as costs in any judgment recovered.

History: En. Sec. 3, Ch. 80, L. 1903;
re-en. Sec. 8471, Rev. C. 1907; re-en. Sec.
11222, R. C. M. 1921.

94-3557. (11577) Discrimination by hospitals forbidden. Every person, persons, corporation or association conducting a hospital or hospitals not held for private or corporate profit or a hospital or hospitals that are institutions of purely public charity, that exempt themselves or are exempted from any state, county or municipal tax by reason thereof, shall not in any manner discriminate between the patients of any regularly licensed physician by reason of the fact that said physician is not a member of the medical staff of said hospital, or for any other reason, and such hospitals are hereby compelled to admit and care for the patients of any regularly licensed physician or physicians under the same terms and conditions as may be promulgated by the management of said hospital for the patients of any other regularly licensed physician.

History: En. Sec. 1, Ch. 114, L. 1913; Hospitals 3.
re-en. Sec. 11577, R. C. M. 1921. 41 C.J.S. Hospitals § 5.

Cross-Reference

Discrimination by hospitals forbidden,
sec. 69-2917.

94-3558. (11578) Penalty for violation of act. Every person, persons, corporation or association who with the intent to injure any patient or to injure the practice of any physician or surgeon is found guilty of violating any of the provisions of this act shall be guilty of a misdemeanor and shall be punished by a fine of not less than five hundred dollars and not exceeding one thousand dollars, and shall forthwith forfeit its right of exemption from taxation.

History: En. Sec. 2, Ch. 114, L. 1913;
re-en. Sec. 11578, R. C. M. 1921.

94-3559. (11556) Diseased animals. It is unlawful for any person having in charge any horse, mule, ass, sheep, hog, or cattle, affected with a contagious disease, to allow such animal to run on any range or to be within any enclosure where they may come in contact with any other animal not so diseased. All animals so affected must be immediately removed to an inside inclosure secure from other animals, or must be herded six miles away from any farm or ranch or from any other stock running at large or being herded. Every person who neglects or refuses to remove, or inclose, or herd as aforesaid, such diseased animals, is guilty of a misdemeanor and liable in damages to the party injured.

History: En. Sec. 1193, Pen. C. 1895; Animals 34.
re-en. Sec. 8867, Rev. C. 1907; re-en. Sec. 3 C.J.S. Animals § 59.
11556, R. C. M. 1921. 2 Am. Jur. 803, Animals, §§ 153 et seq.

Cross-Reference

Diseased animals not to run at large,
sec. 46-237.

Validity of statutes for the control of diseases of livestock. 65 ALR 525.
Validity, construction, and application of statutes relating to transportation or disposal of carcasses of dead animals not slaughtered for food. 121 ALR 732.

94-3560. (11297) Disturbing the peace. Every person who wilfully and maliciously disturbs the peace of any neighborhood or person by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, trading, quarreling, challenging to fight or fighting, or who, on the public streets of any town, or upon the public highways, runs any horserace, either for a wager or for amusement, or fires any gun or pistol in such town, or uses any vulgar, profane, or indecent language within the presence or hearing of any women or children, in a loud and boisterous manner, is punishable by a fine not exceeding two hundred dollars, or by imprisonment in the county jail for not more than ninety days, or both.

History: Ap. p. Sec. 117, p. 206, Bannack Stat.; re-en. Sec. 131, p. 299, Cod. Stat. 1871; re-en. Sec. 131, 4th Div. Rev. Stat. 1879; amd. Sec. 1, p. 42, L. 1883; re-en. Sec. 141, 4th Div. Comp. Stat. 1887; amd. Sec. 1, p. 77, Ex. L. 1887; amd. Sec. 753, Pen. C. 1895; re-en. Sec. 8577, Rev. C. 1907; re-en. Sec. 11297, R. C. M. 1921. Cal. Pen. C. Sec. 415.

Operation and Effect

A person who, in the presence of a large number of women and children, conducts himself in a boisterous, offensive, and disorderly manner, and uses foul and unseemly language, is guilty of a misde-

meanor, and, under section 94-6003, is subject to arrest by any officer who is present, even without a warrant; but no more force can be used for that purpose than is necessary. *Rand v. Butte Electric Ry. Co.*, 40 M 398, 404, 417, 107 P 87.

References

Cited or applied as section 753, Penal Code, in *State v. Koch*, 33 M 490, 495, 85 P 272.

Disturbance of Public Assemblage—1.
27 C.J.S. Disturbance of Public Meetings
§ 1.
8 Am. Jur. 833, Breach of Peace.

94-3561. (11042) Disturbing religious meeting. Every person who wilfully disturbs or disquiets any assemblage of people met for religious worship by noise, profane discourse, rude or indecent behavior, or by unnecessary noise, either within the place where such meeting is held or so near it as to disturb the order and solemnity of the meeting, is guilty of a misdemeanor.

History: En. Sec. 122, p. 207, Bannack Stat.; re-en. Sec. 136, p. 300, Cod. Stat. 1871; re-en. Sec. 136, 4th Div. Rev. Stat. 1879; re-en. Sec. 136, p. 42, L. 1883; re-en. Sec. 146, 4th Div. Comp. Stat. 1887; amd. Sec. 533, Pen. C. 1895; re-en. Sec. 8372,

Rev. C. 1907; re-en. Sec. 11042, R. C. M. 1921. Cal. Pen. C. Sec. 302.

Disturbance of Public Assemblage—1.
27 C.J.S. Disturbance of Public Meetings § 1.

94-3562. (11284) Disturbance of public meetings other than religious or political. Every person who, without authority of law, disturbs or breaks up any assembly or meeting, not unlawful in its character, other than such as is mentioned in sections 94-1420 and 94-3561, is guilty of a misdemeanor.

History: En. Sec. 740, Pen. C. 1895; re-en. Sec. 8564, Rev. C. 1907; re-en. Sec. 11284, R. C. M. 1921. Cal. Pen. C. Sec. 403.

Disturbance of Public Assemblage—1.
27 C.J.S. Disturbance of Public Meetings
§ 1.

94-3563. (11316) Disturbance of railway trains—punishment. Any person or persons who shall, upon any railway train or any car used for the conveyance of passengers, disturb the peace and quiet of any of the passengers upon any such railway train or car by loud and tumultuous noises or by offensive conduct, or by using profane, vulgar, or obscene language, or who shall commit an assault upon the person of another, shall, upon conviction thereof, be fined in a sum not less than twenty-five nor more than

three hundred dollars, or by imprisonment in the county jail for not less than ten nor more than ninety days.

History: En. Sec. 1, Ch. 144, L. 1917; Carriers↔22.
re-en. Sec. 11316, R. C. M. 1921. 13 C.J.S. Carriers §§ 526, 542, 650.

94-3564. (11317) Police power of railroad conductors. Police power is conferred hereby upon every conductor of a railroad company while engaged in operating any passenger train or car lines of railway in the state of Montana, and it shall be the duty of every conductor, while upon duty upon any train or car used for the conveyance of passengers, to arrest any person who shall, in his presence or to his knowledge, be guilty of a disturbance of the peace of other passengers upon such train or car, or who shall commit any assault upon another or who uses profane, obscene, or vulgar language in the presence of women and children, or who conducts himself in a riotous or boisterous manner, and to deliver him or them to a policeman, constable or other peace officer at any station where such officer may be found, and it shall be the duty of such officer to make complaint against such person, and a complaint made upon information and belief of such officer shall be sufficient.

History: En. Sec. 2, Ch. 144, L. 1917; Carriers↔350.
re-en. Sec. 11317, R. C. M. 1921. 13 C.J.S. Carriers § 806.

94-3565. (11531) Ditch overflowing on highway. Every person who owns a ditch or flume, and allows the water therein to overrun the side and run into a public highway, or in or upon the property of another, is punishable by a fine not exceeding one hundred dollars.

History: En. Sec. 1162, Pen. C. 1895; Waters and Water Courses↔266.
re-en. Sec. 8835, Rev. C. 1907; re-en. Sec. 67 C.J. Waters § 1118.
11531, R. C. M. 1921.

94-3566. (11564) Divorce—advertising to procure, forbidden. Any person who advertises, prints, publishes, distributes or circulates, or causes to be advertised, printed, published, distributed, or circulated, any circular, pamphlet, card, handbill, advertisement, printed paper, book, newspaper, or notice of any kind, with intent to procure, or to aid in procuring any divorce, either in this state or elsewhere, shall be fined not less than twenty-five dollars nor more than one hundred dollars, for such offense, or imprisoned in the county jail not less than ten days nor more than thirty days, or both such fine and imprisonment. This act shall not be deemed to apply to the publication of summons in actions for divorce.

History: En. Sec. 1, Ch. 73, L. 1903; Attorney and Client↔33.
re-en. Sec. 8878, Rev. C. 1907; re-en. Sec. 7 C.J.S. Attorney and Client § 59.
11564, R. C. M. 1921. Cal. Pen. C. Sec. 159a.

94-3567. (11552) Dogging livestock. Any person, who shall permit or direct any dog owned by them, or in their possession or in the possession of any employer to chase or run any cattle or other livestock, of which he is not the owner or the person in charge, upon the open range, or government lands or away from any watering place upon the open range, shall be guilty of a misdemeanor and shall be punishable by a fine of not more than fifty dollars.

History: En. Sec. 1, Ch. 110, L. 1903; Animals↔81.
re-en. Sec. 8861, Rev. C. 1907; re-en. Sec. 3 C.J.S. Animals §§ 154, 156, 157, 160,
11552, R. C. M. 1921. 161.

94-3568. (11549) Driving cattle from customary range forbidden. Every person who wilfully drives or causes to be driven any cattle, horses, mules, or sheep from their customary range without the permission of the owner thereof is punishable by imprisonment in the county jail not exceeding ninety days, or by fine not exceeding one hundred dollars, or both.

History: En. Sec. 1, Ch. 60, L. 1919; Codes, before amendment, in State v. Bradshaw, 53 M 96, 100, 161 P 96.
re-en. Sec. 11549, R. C. M. 1921.

This section superseded sections 8858 and 8860, Revised Codes 1907.

References

Cited or applied as section 8860, Revised

Animals⇒14.

3 C.J.S. Animals §§ 36, 37.

94-3569. (11555) Driving cattle on railroad. Every person who wilfully drives any animal upon any railroad track with intent to injure the corporation or persons owning the railroad, and such animal is killed or injured thereby, is punishable by imprisonment in the state prison not exceeding five years.

History: En. Sec. 1191, Pen. C. 1895; re-en. Sec. 8865, Rev. C. 1907; re-en. Sec. 11555, R. C. M. 1921.

Cross-Reference

Driving animals on railroad track, penalty, sec. 72-408.

Animals⇒90.

3 C.J.S. Animals §§ 185-187.

94-3570. (11566.3) Entertainment defined. The term "entertainment" as used in this act shall include every species and kind of entertainment, including vaudeville shows, motion picture shows, variety shows and all forms of dancing; provided, however, that it shall not include the usual and social forms of dancing participated in solely by bona fide patrons.

History: En. Sec. 1, Ch. 184, L. 1935.

94-3571. (11566.4) Entertainment in establishments licensed to sell beer unlawful. Hereafter it shall be unlawful for any person, firm, company, corporation or association of individuals to conduct or provide or permit to be conducted or provided, any entertainment of any sort or kind at, in or about any beer hall or any room, premises, place or establishment at which beer is sold or licensed to be sold, either under the provisions of the Montana beer act or any other law of Montana, now or hereafter in effect, regulating and licensing the sale of beer.

History: En. Sec. 2, Ch. 184, L. 1935.

Intoxicating Liquors⇒143.

48 C.J.S. Intoxicating Liquors §§ 226-228.

94-3572. (11566.5) Penalty for violations. Any person or persons, firm, company, corporation, or association violating any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction shall be punishable by a fine of not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500.00) or by imprisonment in the county jail not to exceed ninety (90) days, or by both such fine and imprisonment, and each day during which any violation of this act shall be permitted to continue, shall constitute a separate offense and shall be subject to like punishment.

History: En. Sec. 3, Ch. 184, L. 1935.

94-3573. (11567) Exhibition of pictures of crime prohibited. Every person who shall exhibit moving pictures wherein are shown or exhibited to the public any scenes or pictures depicting burglaries, train robberies, or other acts which would constitute a felony, is guilty of a misdemeanor.

History: En. Sec. 1, Ch. 66, L. 1907; Theaters and Shows—9.
 Sec. 8881, Rev. C. 1907; re-en. Sec. 11567, 62 C.J. Theaters and Shows § 93 et seq.
 R. C. M. 1921.

94-3574. (11262) Exhibiting deformities of persons. Every person exhibiting the deformities of another, or his own deformities, for hire, is guilty of a misdemeanor; and every person who shall by any artificial means give to any person the appearance of a deformity, and shall exhibit such person for hire, is guilty of a misdemeanor.

History: En. Sec. 699, Pen. C. 1895; Theaters and Shows—9.
 re-en. Sec. 8530, Rev. C. 1907; re-en. Sec. 62 C.J. Theaters and Shows § 93.
 11262, R. C. M. 1921. Cal. Pen. C. Sec. 400.

94-3575. (11257) Exposing person infected with any contagious disease in a public place. Every person who wilfully exposes himself or another infected with any contagious or infectious disease, in any public place or thoroughfare, except in his necessary removal in a manner the least dangerous to the public health, is guilty of a misdemeanor.

History: En. Sec. 694, Pen. C. 1895;
 re-en. Sec. 8525, Rev. C. 1907; re-en. Sec.
 11257, R. C. M. 1921. Cal. Pen. C. Sec. 394.

94-3576. (10988) False imprisonment, definition and punishment. False imprisonment is the unlawful violation of the personal liberty of another, and is punishable by fine not exceeding five thousand dollars, or by imprisonment in the county jail not more than one year, or both.

History: En. Sec. 48, p. 185, Bannack Stat.; re-en. Sec. 63, p. 280, Cod. Stat. 1871; re-en. Sec. 63, 4th Div. Rev. Stat. 1879; re-en. Sec. 67, 4th Div. Comp. Stat. 1887; amd. Sec. 420, Pen. C. 1895; re-en. Sec. 8324, Rev. C. 1907; re-en. Sec. 10988, R. C. M. 1921. Cal. Pen. C. Sec. 236.

Civil Actions Against Sheriff and County Attorney

Where plaintiff compromised an action against the sheriff and his surety for false arrest and imprisonment by defendants paying \$1,000 to plaintiff, he executing a release of defendants captioned "release in full of all claims", reciting that plaintiff accepted said sum as "complete compensation for all injuries sustained in connection with" the matters set forth in the complaint, then brought a like action against the county attorney who set up the release as a bar, held, that nothing appearing in the release reserving his right to proceed against the county attorney, the court upon sustaining his motion for judgment on the pleadings properly dismissed the action. *Beedle v. Carolan*, 115 M 587, 590, 148 P 2d 559.

Failure to Take Person Promptly Before Magistrate

In an action against a sheriff and the surety on his official bond for false imprisonment after arrest without a warrant, based on officer's failure to take plaintiff before a committing magistrate or judicial officer, involving also transportation by federal postal inspectors to neighboring county and interpretation of sec. 591 Title 18 U. S. C. A., held, that evidence sufficient to show prima facie case of such imprisonment, but remanded for new trial unless plaintiff consents to reduction of damages. *Cline v. Tait*, 116 M 571, 574, 155 P 2d 752.

Id. Effect of subsequent conviction in determining actual damages and excessiveness of verdict.

Nature of Crime

False imprisonment is treated as a tort and also as a crime, the definition being the same in either case. The liability of a wrongdoer does not depend primarily upon his mental attitude. *Kroeger v. Passmore*, 36 M 504, 508, 93 P 805.

Treating false imprisonment as a tort, as distinguished from a crime, the only defenses which may be interposed are a

denial of the imprisonment and a justification of the imprisonment. *Kroeger v. Passmore*, 36 M 504, 510, 93 P 805.

In tort, all that is necessary to sustain a judgment is that plaintiff be restrained of his liberty without sufficient legal cause, and by words or acts which he fears to disregard. Where plaintiff, a frail girl clerk in defendant's music store, on report of defendant's auditor that she had embezzled money for goods sold, was called by said defendant and auditor into a sound-proof room in the establishment and there detained by them for about two hours until she had signed a false confession under compulsion and threats of imprisonment, evidence held sufficient to sustain judgment for \$1500 actual and \$500 exemplary damages. *Panisko v. Dreibelbis*, 113 M 310, 316, 124 P 2d 997.

Not Existing Until Imprisonment Becomes Unlawful

Where, after an officer obtains the custody of another by a privileged arrest, he fails to use due diligence in taking him promptly before a proper court or magistrate as required by sec. 94-6016, his misconduct makes him liable to the person arrested only for such harm as is caused thereby but not for the arrest or for keeping him in custody prior to such misconduct, false imprisonment as defined by this section not existing until the moment the imprisonment becomes unlawful. *Cline v. Tait*, 113 M 475, 484, 129 P 2d 89.

Operation and Effect

If an arrest and imprisonment have been accomplished without legal process, it is false imprisonment. *Gorud v. Losel*, 48 M 274, 283, 136 P 1069.

Id. False imprisonment is an unlawful violation of the personal liberty of another, and is the subject of an action, whether the wrongful act is prompted by malice or not.

The gist of the offense of false imprisonment, as defined in this section, is the unlawful detention. *Stephens v. Conley*, 48 M 352, 364, 138 P 189.

False imprisonment is any unlawful violation of the personal liberty of another, both at common law and under the statute. *In re McDonald*, 50 M 348, 351, 146 P 942.

The statutory provision, defining the crime of false imprisonment, defines also the civil wrong resulting from it; therefore, in order to make out a case for damages, the plaintiff must allege a violation of his personal liberty, and that such violation was without legal justification. *Slifer v. Yorath*, 52 M 129, 132, 155 P 1113.

References

Plummer v. Northern Pac. Ry. Co., 79 M 82, 87, 255 P 18.

False Imprisonment—43.

35 C.J.S. False Imprisonment § 71.

22 Am. Jur. 440, False Imprisonment, § 136.

94-3577. (11557) Fences, unlawful and dangerous—punishment for. Any person owning any lands in this state, or if the owner is not a resident wherein said land is situated, his managing agent, or if such lands are leased, the lessor, who shall permit any barbed or other wire to remain down, or broken in such condition as to be dangerous to livestock, for the period of thirty days, and the further period of ten days, after personal service upon him of a notice in writing, to repair said wire, shall be deemed guilty of a misdemeanor.

History: En. Sec. 1194, Pen. C. 1895; re-en. Sec. 8868, Rev. C. 1907; re-en. Sec. 11557, R. C. M. 1921.

Fences—28 (1).

36 C.J.S. Fences § 18.

94-3578. (11530) Firing firearms. Every person who wilfully shoots or fires off, a gun, pistol, or any firearm, within the limits of any town or city, or of any private enclosure which contains a dwelling-house, is punishable by a fine not exceeding twenty-five dollars.

History: En. Secs. 1, 2, p. 46, Ex. L. 1873; re-en. Sec. 185, 4th Div. Rev. Stat. 1879; re-en. Sec. 228, 4th Div. Comp. Stat. 1887; amd. Sec. 1161, Pen. C. 1895; re-en. Sec. 8834, Rev. C. 1907; re-en. Sec. 11530, R. C. M. 1921.

"city or town" without any definite prefix, but under circumstances which would render it absurd to hold that only incorporated cities and towns are meant. *State ex rel. Powers v. Dale*, 47 M 227, 230, 131 P 670.

Operation and Effect

An illustration is found in this section of the frequent legislative use of the term

Weapons—15.

63 C.J. Weapons § 76 et seq.

94-3579. (11565) Firearms—use of by children under the age of fourteen years prohibited. It shall be unlawful for any parent, guardian, or other person, having the charge or custody of any minor child under the age of fourteen years, to permit such minor child to carry or use any firearms of any description, loaded with powder and lead, in public, except when such child is in the company of such parent or guardian.

History: En. Sec. 1, Ch. 111, L. 1907; Infants↔20.
 Sec. 8879, Rev. C. 1907; re-en. Sec. 11565, 43 C.J.S. Infants § 16.
 R. C. M. 1921.

94-3580. (11566) Liability of parent or guardian. Any parent, guardian, or other person, violating the provisions of this act shall be guilty of a misdemeanor, and the county attorney, on complaint of any person, must prosecute violations of this act.

History: En. Sec. 2, Ch. 111, L. 1907;
 Sec. 8880, Rev. C. 1907; re-en. Sec. 11566,
 R. C. M. 1921.

94-3581. (11561) Flag—desecration of. Any person who, in any manner for exhibition or display, shall place or cause to be placed any word, figure, mark, picture, design, drawing, or any advertisement of any nature upon any flag, standard, color, or ensign of the United States of America, or shall expose, or cause to be exposed to public view any such flag, standard, color or ensign upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away or for use for any purpose, any article or substance, being any article of merchandise or receptacle of merchandise, upon which shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color, or ensign to advertise, call attention to, decorate, mark, or distinguish the article or substance on which so placed, or who shall publicly mutilate, defile, or defy, trample upon, or cast contempt upon, either by words or acts, any such flag, standard, color, or ensign, shall be punished by imprisonment in the county jail for a term not exceeding one year, or by a term in the state penitentiary not exceeding five years, and in addition, a fine not exceeding one thousand dollars.

History: En. Sec. 1, Ch. 63, L. 1905; United States↔5½.
 re-en. Sec. 8875, Rev. C. 1907; amd. Sec. 1, 36 C.J.S. Flags § 2.
 Ch. 12, Ex. L. 1918; re-en. Sec. 11561, R.
 C. M. 1921.

94-3582. (11562) Meaning of term "flag." The words flag, standard, color, or ensign, as used in this act, shall include any flag, standard, color, ensign, or any picture or representation of either thereof, made of any substance or represented on any substance, and of any size evidently purporting to be said flag, standard, color, or ensign of the United States of America, or a picture, or representation of either thereof upon which shall be shown the colors, the stars, and the stripes in any number of either thereof, or by which the person seeing the same without deliberation may believe

the same to represent the flag, color, standard, or ensign of the United States of America.

History: En. Sec. 2, Ch. 63, L. 1905;
re-en. Sec. 8876, Rev. C. 1907; re-en. Sec.
11562, R. C. M. 1921.

94-3583. (11563) Exceptions. This act shall not apply to any act permitted by the statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, or stationery for use in correspondence, on any of which shall be printed, painted or placed said flag, disconnected from any advertisement.

History: En. Sec. 3, Ch. 63, L. 1905;
re-en. Sec. 8877, Rev. C. 1907; re-en. Sec.
11563, R. C. M. 1921.

94-3584. (11300) Forcible entry and detainer. Every person using or procuring, encouraging or assisting another to use any force or violence in entering upon or detaining any lands or other possessions of another, except in the cases and in the manner allowed by law, is guilty of a misdemeanor.

History: En. Sec. 756, Pen. C. 1895; Trespass 79.
re-en. Sec. 8580, Rev. C. 1907; re-en. Sec. 63 C.J. Trespass § 319.
11300, R. C. M. 1921. Cal. Pen. C. Sec. 418.

94-3585. (11522) Fortune telling, etc., forbidden. Any person or persons who shall advertise or otherwise represent, pretend, or profess to be a fortune teller, clairvoyant, palmist or astrologist, or who shall, whether designating or representing himself or herself to be such or not, advertise or otherwise represent, pretend or profess to be able to foretell events with reference to any manner of business transaction, courtship, marriage or divorce, or to be able to locate lost or stolen property, friends or relatives, or to locate or find mines, veins, ores, metals or subterranean waters, or who shall pretend or represent himself or herself to be able to tell or read, or predict, the fortune, future, present or past condition of any person or persons by means of fortune telling, clairvoyancy, palmistry or astrology, or any other means or device or shall pretend or represent himself or herself to be able to, or promise to affect the condition or future, or to bring about or effect the desires or fortune of any person or persons whomsoever, by such or any of such means or methods, shall be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than twenty-five dollars nor more than three hundred dollars, or by imprisonment in the county jail for a period of not less than one nor more than three months, or by both such fine and imprisonment; provided, however, that nothing in this act shall be construed to prohibit or restrict investigation and experiment in the mental science, psychical research, theatrical exhibitions, and other public performance from the public stage.

History: En. Sec. 1, Ch. 102, L. 1909; Disorderly Conduct 1.
re-en. Sec. 11522, R. C. M. 1921. 27 C.J.S. Disorderly Conduct § 1.

94-3586. (11523) Advertising as a fortune teller forbidden. Any person who publishes, distributes, circulates, or causes to be published, distributed or circulated any dodgers, circulars, pamphlets or advertisements holding

out or advertising any person as a fortune teller, clairvoyant, palmist or astrologist or as being able to do any of the acts or things prohibited by the preceding section, shall be guilty of a misdemeanor and punished by a fine of not less than ten nor more than one hundred dollars.

History: En. Sec. 2, Ch. 102, L. 1909;
re-en. Sec. 11523, R. C. M. 1921.

94-3587. (11524) Same—penalty for newspapers accepting advertisement. The proprietor, editor, manager or any other person in charge of any newspaper or printing establishment, publishing or advertising any of the things prohibited by this act shall be guilty of a violation of the provisions of the preceding section.

History: En. Sec. 3, Ch. 102, L. 1909;
re-en. Sec. 11524, R. C. M. 1921.

94-3588. (11258) Fraudulent practices to affect the market price. Every person who wilfully makes or publishes any false statement, spreads any false rumor, or employs any other false or fraudulent means or device with intent to affect the market price of any kind of property, is guilty of a misdemeanor.

History: En. Sec. 695, Pen. C. 1895; Fraud—68.
re-en. Sec. 8526, Rev. C. 1907; re-en. Sec. 2 C.J.S. Agency § 10; 37 C.J.S. Fraud
11258, R. C. M. 1921. Cal. Pen. C. Sec. 395. § 154.

94-3589. (10934) Fraudulent pretenses relative to birth of infant. Every person who fraudulently produces an infant, falsely pretending it to have been born of any parent whose child would be entitled to inherit any real estate, or to receive a share of any personal estate, with intent to intercept the inheritance of any such real estate, or the distribution of any such personal estate, from any person lawfully entitled thereto, is punishable by imprisonment in the state prison not exceeding ten years.

History: En. Sec. 283, Pen. C. 1895; Descent and Distribution—26.
re-en. Sec. 8265, Rev. C. 1907; re-en. Sec. 26 C.J.S. Descent and Distribution § 28.
10934, R. C. M. 1921. Cal. Pen. C. Sec. 156. See generally, 22 Am. Jur. 443, False
Pretenses and Allied Criminal Frauds.

94-3590. (10935) Same—substituting one child for another. Every person to whom an infant has been confided for nursing, education, or any other purpose, who, with intent to deceive any parent or guardian of such child, substitutes or produces to such parent or guardian another child in the place of the one so confided, is punishable by imprisonment in the state prison not exceeding seven years.

History: En. Sec. 284, Pen. C. 1895; Infants—20.
re-en. Sec. 8266, Rev. C. 1907; re-en. Sec. 43 C.J.S. Infants § 16.
10935, R. C. M. 1921. Cal. Pen. C. Sec. 157. See generally, 22 Am. Jur. 443, False
Pretenses and Allied Criminal Frauds.

94-3591. (11283.1) Gas masks to be provided employees handling crude oil and gas—requirement. From and after the passage of this act, it shall be unlawful for all oil and gas companies, or refineries, or any person or persons, or corporations, or associations, storing or dealing in crude oil or gas or any highly volatile derivatives of the same, where there is danger of suffocation to an employee, to require such employee to undertake such duty, or perform such work, without being provided with a standard gas

mask; and where such duty or work is required of an employee, the employer shall further provide such a standard gas mask in good working condition for immediate use.

History: En. Sec. 1, Ch. 143, L. 1931.

Master and Servant↪14.
39 C.J. Master and Servant § 53.

94-3592. (11283.2) Penalties. Any person, firm or corporation failing to provide said safety appliances for the protection of their employees shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100.00), nor more than five hundred dollars (\$500.00), or by imprisonment in the county jail for not less than thirty (30) days nor more than six (6) months, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 143, L. 1931.

94-3593. (11264) Glanders—animal having, to be killed. Every animal having glanders or farcy shall at once be deprived of life by the owner or person having charge thereof, upon discovery or knowledge of its condition; and any such owner or person omitting or refusing to comply with the provisions of this section is guilty of a misdemeanor.

History: En. Sec. 701, Pen. C. 1895;
re-en. Sec. 8532, Rev. C. 1907; re-en. Sec.
11264, R. C. M. 1921. Cal. Pen. C. Sec.
402b.

Animals↪32.
3 C.J.S. Animals § 55.

94-3594. (11263) Same—using or exposing animal with glanders. Any person who shall knowingly sell or offer for sale, or use, or expose, or who shall cause or procure to be sold or offered for sale, or used, or exposed, any horse, mule, or other animal having the disease known as glanders, farcy, or any contagious disease, is guilty of a misdemeanor.

History: En. Sec. 700, Pen. C. 1895;
re-en. Sec. 8531, Rev. C. 1907; re-en. Sec.
11263, R. C. M. 1921. Cal. Pen. C. Sec. 402.

Animals↪34.
3 C.J.S. Animals § 59.

94-3595. (10942) Grand juror acting after challenge has been allowed. Every grand juror who, with a knowledge that a challenge interposed against him by a defendant has been allowed, is present at, or takes part, or attempts to take part in the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon, is guilty of a misdemeanor.

History: En. Sec. 291, Pen. C. 1895;
re-en. Sec. 8273, Rev. C. 1907; re-en. Sec.
10942, R. C. M. 1921. Cal. Pen. C. Sec. 164.

Grand Jury↪18.
38 C.J.S. Grand Juries §§ 28, 30.

94-3596. (11215) Habeas corpus—refusing to issue or obey writ of. Every officer or person to whom a writ of habeas corpus may be directed, who, after service thereof, neglects or refuses to obey the command thereof, is guilty of a misdemeanor.

History: En. Sec. 652, Pen. C. 1895;
re-en. Sec. 8463, Rev. C. 1907; re-en. Sec.
11215, R. C. M. 1921. Cal. Pen. C. Sec. 362.

Habeas Corpus↪68.
39 C.J.S. Habeas Corpus § 85.

94-3597. (11216) Reconfining persons discharged upon writ of habeas corpus. Every person who, either solely or as a member of court, knowingly and unlawfully recommits, imprisons, or restrains of his liberty, for the same

cause, any person who has been discharged upon a writ of habeas corpus, is guilty of a misdemeanor.

History: En. Sec. 653, Pen. C. 1895;
re-en. Sec. 8464, Rev. C. 1907; re-en. Sec.
11216, R. C. M. 1921. Cal. Pen. C. Sec. 363.

False Imprisonment 43.
35 C.J.S. False Imprisonment § 71.

94-3598. (11217) Concealing persons entitled to benefit of habeas corpus. Every person having in his custody, or under his restraint or power, any person for whose relief a writ of habeas corpus has been issued, who, with the intent to elude the service of such writ or to avoid the effect thereof, transfers such person to the custody of another, or places him under the power or control of another, or conceals or changes the place of his confinement or restraint, or removes him without the jurisdiction of the court or judge issuing the writ, is guilty of a misdemeanor.

History: En. Sec. 654, Pen. C. 1895;
re-en. Sec. 8465, Rev. C. 1907; re-en. Sec.
11217, R. C. M. 1921. Cal. Pen. C. Sec. 364.

94-3599. (11236) Health laws—wilful violation of. Every person who wilfully violates any of the laws of this state, relating to the preservation of the public health, is, unless a different punishment is prescribed by this code, punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or both.

History: En. Sec. 677, Pen. C. 1895;
re-en. Sec. 8485, Rev. C. 1907; re-en. Sec.
11236, R. C. M. 1921. Cal. Pen. C. Sec. 377.

Health 43.
39 C.J.S. Health § 35.

94-35-100. (11237) Health laws—neglecting to perform duties under. Every person charged with the performance of any duty under the laws of this state, relating to the preservation of the public health, who wilfully neglects or refuses to perform the same, is guilty of a misdemeanor.

History: En. Sec. 678, Pen. C. 1895;
re-en. Sec. 8486, Rev. C. 1907; re-en. Sec.
11237, R. C. M. 1921. Cal. Pen. C. Sec. 378.

94-35-101. (11551) Horses, etc.—taking up or restraining, without owner's consent—penalty. Any person, persons, corporation or company, who shall take up or retain in his or their possession, any mare, gelding, colt, foal, filly, mule, jack or jennet, the owner of which cannot with reasonable diligence be found, or of which he is not the owner, without the owner's knowledge or consent, or who shall in any manner restrain from liberty for the purpose or purposes of using or making use of such animal without the knowledge and consent of the owner, shall be guilty of a misdemeanor and shall be punishable by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment in the county jail not exceeding sixty days, or by both such fine and imprisonment.

History: En. Sec. 1, Ch. 126, L. 1909;
re-en. Sec. 11551, R. C. M. 1921.

Animals 61.
3 C.J.S. Animals §§ 87, 90-93, 95-99.

94-35-102. (11314) Indians—prohibiting the carrying of firearms by, while off reservation. Any Indian who while off, or away from, any Indian reservation carries or bears, or causes to be carried or borne by any member of any party with which he may travel or stop, any pistol, revolver, rifle, or other firearm, or any ammunition for any firearm, shall be guilty of a

misdemeanor. And such arms shall be seized, confiscated, and sold by the officer making the arrest, and the proceeds from such sale shall be disposed of as follows: When seized and sold by an officer of the stock association the proceeds shall be sent to the state treasurer and by him placed to the credit of the stock inspector and detective fund; when seized and sold by a game warden the proceeds shall be placed to the credit of the fish and game fund; and when seized and sold by any other peace officer the proceeds shall be turned over to the county treasurer and placed to the credit of the general fund in which county the arrest and seizure is made.

History: En. Sec. 1, Ch. 84, L. 1903; Indians⇒26.
re-en. Sec. 8590, Rev. C. 1907; re-en. Sec. 42 C.J.S. Indians §§ 75, 79, 81.
11314, R. C. M. 1921.

94-35-103. (11259) Indians—selling firearms and ammunition to. Every person who sells or furnishes to any Indian any firearm or ammunition therefor, is guilty of a misdemeanor.

History: En. Sec. 696, Pen. C. 1895; Indians⇒33.
re-en. Sec. 8527, Rev. C. 1907; re-en. Sec. 42 C.J.S. Indians § 105 et seq.
11259, R. C. M. 1921. Cal. Pen. C. Sec. 398.

94-35-104. (11218) Innkeepers and carriers refusing to receive guests. Every person, and every agent or officer of any corporation, carrying on business as an innkeeper, or as a common carrier of passengers, who refuses, without just cause or excuse, to receive and entertain any guest, or to receive or entertain any passenger, is guilty of a misdemeanor.

History: En. Sec. 655, Pen. C. 1895; Carriers⇒21; Innkeepers⇒15.
re-en. Sec. 8466, Rev. C. 1907; re-en. Sec. 13 C.J.S. Carriers § 1008 et seq.; 43 C.J.S.
11218, R. C. M. 1921. Cal. Pen. C. Sec. 365. Innkeepers § 27.

94-35-105. (11280) Inspection of mines—penalties—dams and reservoirs, unsafe. Every person who violates any of the provisions of sections 50-101 to 50-114, relating to the inspection of mines, and every person who violates any of the provisions of sections 89-701 to 89-714, relating to dams and reservoirs, is guilty of a misdemeanor.

History: En. Sec. 722, Pen. C. 1895; Mines and Minerals⇒95.
re-en. Sec. 8563, Rev. C. 1907; re-en. Sec. 40 C.J. Mines and Minerals § 793.
11280, R. C. M. 1921.

94-35-106. (11048.1) Intoxicating liquors—penalty for giving or selling to any person under the age of twenty-one years. Any person who shall sell, give away or dispose of intoxicating liquors to any person under the age of twenty-one (21) years, shall be guilty of a misdemeanor, and for the first offense, be punishable by a fine of not less than two hundred and fifty dollars (\$250.00), nor more than five hundred dollars (\$500.00) and by imprisonment for not less than six (6) months nor more than one (1) year in the county jail, and for the second and subsequent offenses, he shall be guilty of a felony and punishable by a fine of not less than five hundred dollars (\$500.00), nor more than two thousand dollars (\$2,000.00), and by imprisonment in the state penitentiary for not less than one (1) year, nor more than two (2) years. Nothing herein contained shall prohibit the furnishing of intoxicating liquors to any person under the age of twenty-one (21) years upon any physician's prescription where authorized by the law nor the furnishing of wine for sacramental purposes.

History: En. Sec. 1, Ch. 122, L. 1927; amd. Sec. 1, Ch. 124, L. 1941.

NOTE.—Repealed by implication (see below). Also see Ch. 143, L. 1949.

Cross-Reference

Sale of alcoholic beverages to minors prohibited, secs. 4-161, 4-413.

Impliedly Repealed

This section was repealed by implication before the authorization of the 1935 codification, and before the 1935 codes were adopted and its appearance in the 1935 code as section 11048.1 is unauthorized. *State v. Holt*, ___ M ___, 194 P 2d 651, 657.

Evidence of Sale to Other Minors Admissible

Testimony of six boys other than the complaining witness that defendant had sold liquor to each of them in his place of business, all of whom exhibited a complete knowledge of the liquor in the drinks sold to them, was competent, the court properly covering the matter of other sales in its instructions, and more than sufficient to warrant submission of the case to the jury. *State v. Gussenhoven*, 116 M 350, 351, 152 P 2d 876.

Operation and Effect

The information in a prosecution charging sale of intoxicating liquor to a minor under this section, need not specify the particular kind of liquor, the allegation that defendant sold certain intoxicating liquor, etc., being sufficient to advise defendant of the charge against him within the meaning of section 94-6403, declaring that the information must contain a statement of facts constituting the offense, in ordinary and concise language so as to enable a person of common understanding to know what is intended. *State v. Baker*, 87 M 295, 297, 286 P 1113. See also *State v. Clark*, 87 M 416, 421, 288 P 186.

Question of Punishment for Legislature, Not Court

Assignment of error that the punishment imposed for selling intoxicating liquor to a minor under this section is excessive, held properly a matter for consideration by the legislature and not one to be urged on appeal to the supreme court. *State v. Gussenhoven*, 116 M 350, 351, 152 P 2d 876.

Intoxicating Liquors—159 (1), 242.

48 C.J.S. Intoxicating Liquors §§ 259, 380.

94-35-107. (11048.2) "Intoxicating liquor" defined. When used in this act, or in any other laws of the state relating to intoxicating liquors, the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented or not, and by whatever name called containing one-half of one per centum, or more of alcohol by volume which are fit for use for beverage purposes; provided, that the foregoing definition shall not extend to dealcoholized wine, nor to any beverage or liquid produced by the process by which beer, ale, porter, or wine is produced, if it contains less than one-half of one per centum of alcohol by volume.

History: En. Sec. 2, Ch. 122, L. 1927.

NOTE.—See annotation to preceding section.

Intoxicating Liquors—134.

48 C.J.S. Intoxicating Liquors §§ 10, 57, 217.

94-35-108. (11193) Intoxicated physicians, acts of. Every physician who, in a state of intoxication, does any act as such physician to another person by which the life of such other person is endangered, is guilty of a misdemeanor.

History: En. Sec. 630, Pen. C. 1895; re-en. Sec. 8441, Rev. C. 1907; re-en. Sec. 11193, R. C. M. 1921. Cal. Pen. C. Sec. 346.

Physicians and Surgeons—10.

48 C.J. Physicians and Surgeons § 11 et seq.

94-35-109. (11253) Intoxication of engineers, conductors or drivers of locomotives or cars. Every person who is intoxicated while in charge of a locomotive engine, or while as conductor or driver upon any railroad car or train, whether propelled by steam or otherwise, or while acting as train

dispatcher, or as telegraph operator receiving or transmitting dispatches in relation to the movement of trains, is guilty of a misdemeanor.

History: En. Sec. 690, Pen. C. 1895; Railroads \S 255 (3).
re-en. Sec. 8521, Rev. C. 1907; re-en. Sec. 51 C.J. Railroads \S 1111 et seq.
11253, R. C. M. 1921. Cal. Pen. C. Sec. 391.

94-35-110. (11459) Issuing fictitious bills of lading, etc. Every person being the master, owner, or agent of any vessel, or officer or agent, of any railroad, express or transportation company, or otherwise being or representing any carrier, who delivers any bill of lading, receipt, or other voucher, by which it appears that any merchandise of any description has been shipped on board any vessel, or other carrier, unless the same has been so shipped or delivered, and is at the time actually under the control of such carrier, or the master, owner, or agent of such vessel, or of some officer or agent of such company, to be forwarded as expressed in such bill of lading, receipt, or voucher, is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

History: En. Sec. 1020, Pen. C. 1895;
re-en. Sec. 8731, Rev. C. 1907; re-en. Sec.
11459, R. C. M. 1921. Cal. Pen. C. Sec. 577.

94-35-111. (11460) Issuing fictitious warehouse receipts. Every person carrying on the business of a warehouseman, wharfinger, or other depository of property, who issues any receipt, bill of lading, or other voucher for any merchandise of any description, which has not been actually received upon the premises of such person, and is not under his actual control at the time of issuing such instrument, whether such instrument is issued to a person as being the owner of such merchandise, or as security for any indebtedness, is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

History: En. Sec. 1021, Pen. C. 1895;
re-en. Sec. 8732, Rev. C. 1907; re-en. Sec.
11460, R. C. M. 1921. Cal. Pen. C. Sec. 578.

94-35-112. (11461) Erroneous bills of lading or receipts issued in good faith. No person can be convicted of any offense under the last two sections by reason that the contents of any barrel, box, cask, or other vessel or package mentioned in the bill of lading, receipt, or other voucher, did not correspond with the description given in such instrument of the merchandise received, if such description corresponded substantially with the marks, labels, or brands upon the outside of such vessel, or package, unless it appears that the accused knew such marks, labels, or brands were untrue.

History: En. Sec. 1022, Pen. C. 1895; Carriers \S 21; Warehousemen \S 36.
re-en. Sec. 8733, Rev. C. 1907; re-en. Sec. 13 C.J.S. Carriers \S 514 et seq.; 67 C.J.
11461, R. C. M. 1921. Cal. Pen. C. Sec. 579. Warehousemen and Safe Depositaries \S 292.

94-35-113. (11462) Duplicate receipts must be marked "duplicate." Every person mentioned in this chapter, who issues any second or duplicate receipt or voucher, of a kind specified therein, at a time while any former receipt or voucher for the merchandise specified in such second receipt is outstanding and uncanceled, without writing across the face of the same the word "duplicate" in a plain and legible manner, is punishable by imprison-

ment in the state prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both.

History: En. Sec. 1023, Pen. C. 1895;
re-en. Sec. 8734, Rev. C. 1907; re-en. Sec.
11462, R. C. M. 1921. Cal. Pen. C. Sec. 580.

94-35-114. (11463) Selling, etc., property received for transportation or storage. Every person mentioned in this chapter who sells, hypothecates or pledges any merchandise for which any bill of lading, receipt, or voucher has been issued by him, without the consent in writing thereto of the person holding such bill, receipt or voucher, is punishable by imprisonment in the state prison not exceeding five years, or by a fine not exceeding one thousand dollars, or both. The provisions of this section do not apply where the property is demanded or sold under process of law.

History: En. Sec. 1024, Pen. C. 1895;
re-en. Sec. 8735, Rev. C. 1907; re-en. Sec.
11463, R. C. M. 1921. Cal. Pen. C. Sec. 581.

94-35-115. (11525) Issuing or circulating paper money. Every person who makes, issues, or puts in circulation, any bill, check, ticket, certificate, promissory note, or the paper of any bank, to circulate as money, except as authorized by the laws of the United States, for the first offense is guilty of a misdemeanor, and for each and every subsequent offense is guilty of felony.

History: En. Sec. 1156, Pen. C. 1895; Counterfeiting \hookrightarrow 90.
re-en. Sec. 8829, Rev. C. 1907; re-en. Sec. 20 C.J.S. Counterfeiting § 9 et seq.
11525, R. C. M. 1921. Cal. Pen. C. Sec. 648.

94-35-116. (11528) Leaving gates open. Every person who wilfully leaves open a gate, when found closed, leading in or out of any inclosed premises, whether inclosed by a lawful fence or not, is punishable by a fine of not less than ten dollars (\$10.00), nor more than two hundred fifty dollars (\$250.00), or by imprisonment in the county jail not more than three (3) months or by both such fine and imprisonment. This act shall not apply to cities and towns.

History: En. Sec. 10, p. 48, L. 1881; Malicious Mischief \hookrightarrow 1.
re-en. Sec. 275, 4th Div. Comp. Stat. 1887; 38 C.J. Malicious Mischief § 1.
amd. Sec. 1159, Pen. C. 1895; re-en. Sec.
8832, Rev. C. 1907; re-en. Sec. 11528, R.
C. M. 1921; amd. Sec. 1, Ch. 50, L. 1923.

94-35-117. (11574) Logs—permitting to accumulate alongshore forbidden. Any person or corporation who shall run or float sawlogs or other timber upon the surface of any navigable lake within the state of Montana, shall not allow such sawlogs or other timber to accumulate along the shore, or in any bay, of such navigable lake, in such a way as to obstruct or interfere with free access to any lands lying between high-water mark and low-water mark of such lake, and between high-water mark and the open waters of such lake so as to leave at all times one hundred and fifty feet open water along the shore of such lake, except as provided in the following section.

History: En. Sec. 1, Ch. 147, L. 1911; Logs and Logging \hookrightarrow 37.
re-en. Sec. 11574, R. C. M. 1921. 38 C.J. Logs and Logging § 237; 45 C.J.
Negligence § 131.

94-35-118. (11575) Same—control of logs on navigable lake. Any person or corporation using the waters of any navigable lake for floating logs or timber, shall so dispose of such logs and timber along the shore, or in any bay, of any such navigable lake within the state of Montana, that a free passageway from high-water mark to the unobstructed surface of such lake shall at all times be left open, and such passageway shall not be less than one hundred and fifty feet in width of open water along the shore of such lake, provided that said logs may be held at a distance of less than one hundred and fifty feet from the shore, where the land abutting the water is owned by the same party owning the logs, but if such logs occupy the water for a distance of six hundred feet or more along the shore of such lake, then and in that event an open channel not less than one hundred feet in width shall be maintained through said logs from the shore, to the open waters of the lake, and one such open channel shall be maintained for each six hundred feet of the shore line that is so obstructed.

History: En. Sec. 2, Ch. 147, L. 1911;
re-en. Sec. 11575, R. C. M. 1921.

94-35-119. (11576) Penalty for violation of act. Any person or corporation who shall violate any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum not exceeding five hundred dollars, or imprisonment in the county jail not exceeding a period of thirty days, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 147, L. 1911;
re-en. Sec. 11576, R. C. M. 1921.

94-35-120. (11233) Maintaining a nuisance a misdemeanor. Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who wilfully omits to perform any legal duty which relates to the removal of a public nuisance, is guilty of a misdemeanor.

History: En. Sec. 674, Pen. C. 1895;
re-en. Sec. 8482, Rev. C. 1907; re-en. Sec.
11233, R. C. M. 1921. Cal. Pen. C. Sec. 372.

Nuisance⊕95.
46 C.J. Nuisances § 494.

References

City of Bozeman v. Merrell, 81 M 19, 29,
261 P 876.

94-35-121. (11213) Making false return or record of marriage. Every person authorized to solemnize any marriage, who wilfully makes a false return of any marriage or pretended marriage, to the county clerk, and every person who wilfully makes a false record of any marriage return, is punishable as provided in section 94-3539.

History: En. Sec. 650, Pen. C. 1895;
re-en. Sec. 8461, Rev. C. 1907; re-en. Sec.
11213, R. C. M. 1921. Cal. Pen. C. Sec. 360.

Marriage⊕32.
38 C.J. Marriage § 87.

94-35-122. (10948) Maliciously procuring warrant. Every person who maliciously and without probable cause procures a search warrant, or warrant of arrest, to be issued and executed, is guilty of a misdemeanor.

History: En. Sec. 297, Pen. C. 1895;
re-en. Sec. 8279, Rev. C. 1907; re-en. Sec.
10948, R. C. M. 1921. Cal. Pen. C. Sec. 170.

False Imprisonment⊕43; Malicious Prosecution⊕78.
35 C.J.S. False Imprisonment § 71; 38
C.J. Malicious Prosecution § 216.

94-35-123. (3202.1) Mescal button—unlawful to dispense. That it shall be unlawful for any person, firm, corporation or association to sell, furnish, or give away, or offer to sell, furnish or give away, or have in his or its possession Peyote (Pellote), botanically known as *Lophophora Williamsii*; or *Agave Americana*, commonly known as the Mescal Button; or any compound, derivative, or preparation thereon.

History: En. Sec. 1, Ch. 22, L. 1923.

Operation and Effect

Held, that section 4, article III of the state constitution, guaranteeing the free exercise and enjoyment of religious profession and worship, is not in conflict with any provision of the federal constitution, and that such provision cannot be in-

voked as a protection against legislation enacted by chapter 22, laws of 1923 (this section), prohibiting the unlawful possession of peyote (a narcotic), under the claim that the drug was possessed for use by members of a church to which defendant belonged, for sacramental purposes. *State v. Big Sheep*, 75 M 219, 225, 243 P 1067.

94-35-124. (3202.2) Penalty for violation. Any person who shall violate any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed five hundred (\$500.00) dollars, or imprisonment in the county jail for a period of not to exceed six months, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 22, L. 1923.

94-35-125. (11267) Mining shafts, drifts or cuts to be covered or fenced, when—penalty. Every person who sinks any shaft or runs any drift or cut, or causes the same to be done, within the limits of any city or town or village in this state, or within one mile of the corporate limits of any city or town, or within three hundred feet of any street, road, or public highway, and who shall fail to place a substantial cover over or tight fence around the same, is punishable by a fine not exceeding one thousand dollars. The owner of any property, or his agent in charge thereof, or any person in possession of the same shall be deemed to be within the provisions of this act if he permit any such shaft, drift, or cut to remain open, exposed, or unprotected upon his property, or the property in his charge or possession, for a period of more than ten days. Mining, irrigating, and other ditches may be dug or cut to a depth not exceeding ten feet without incurring the penalty of this section.

History: En. Sec. 1, p. 593, Cod. Stat. 1871; re-en. Sec. 255, 4th Div. Comp. Stat. 1887; amd. Sec. 704, Pen. C. 1895; amd. Sec. 1, p. 149, L. 1899; re-en. Sec. 8535, Rev. C. 1907; re-en. Sec. 11267, R. C. M. 1921.

City or Town

An illustration is found in this section of the frequent legislative use of the term "city or town" without any definite prefix, but under circumstances which would render it absurd to hold that only incorporated cities and towns are meant. *State ex rel. Powers v. Dale*, 47 M 227, 230, 131 P 670.

Constitutes Negligence Per Se

Failure to observe the duty imposed by this section, upon the person owning or in possession of property within the limits

of a city or town, or within one mile of such limits, on which there is a mining shaft, to place a cover over or a tight fence around the same, is negligence per se. *Conway v. Monidah Trust*, 47 M 269, 278, 132 P 26. See *Nixon v. Montana, Wyoming & Southwestern Ry. Co.*, 50 M 95, 100, 145 P 8; *Kelley v. John R. Daily Co.*, 56 M 63, 73, 181 P 326.

Liability as to Trespasser

Though a plaintiff infant was a technical trespasser upon defendant's mining claim, into an unguarded shaft on which he fell, the defendant's omission to comply with the requirement imposed upon him by this section rendered him liable to damages for injuries suffered by the plaintiff. *Conway v. Monidah Trust*, 47 M 269, 279, 132 P 26. See *Nixon v. Mon-*

tana, Wyoming & Southwestern Ry. Co., 50 M 95, 100, 145 P 8.

Not Applicable to a Temporary Sewer Ditch

This section has no application to a ditch or trench temporarily opened for the purpose of laying sewer-pipe. McLaughlin v. Bardsen et al., 50 M 177, 145 P 954.

Owner Liable Even Though He Did Not Sink Shaft

The fact that defendant had not sunk the shaft into which plaintiff fell did not relieve him of liability, this section making it unlawful for the owner or possessor to permit the shaft to remain open or

unprotected for a period of more than ten days, without regard to when or by whom it was sunk. Conway v. Monidah Trust, 47 M 269, 281, 132 P 26.

Within a Mile of the Corporate Limits

Evidence held insufficient to show that the shaft into which plaintiff fell was situated within a mile of the corporate limits of a city, a fact necessary to be shown to bring defendant within the purview of this section. Conway v. Monidah Trust, 47 M 269, 282, 132 P 26.

Mines and Minerals 92.

40 C.J. Mines and Minerals § 776 et seq.

94-35-126. (11268) Mining—cages in mines must be cased in. It is unlawful for any corporation or person to sink or work, through any vertical shaft where mining cages are used, to a greater depth than three hundred feet, unless said shaft shall be provided with an iron-bonneted safety cage, to be used in the lowering and hoisting of the employees thereof, said cage to be also provided with sheet iron or steel casing not less than one-eighth inch in diameter; doors to be made of the same material shall be hung on hinges, or may be made to slide and shall not be less than five feet high from the bottom of the cage, and said door must be closed when lowering or hoisting the men. Provided, that when such cage is used for sinking only, it need not be equipped with such doors as are hereinbefore provided for. The safety apparatus, whether consisting of eccentrics, springs, or other device, must be securely fastened to the cage, and must be of sufficient strength to hold the cage loaded at any depth to which the shaft may be sunk. The iron bonnet of the aforesaid cage must be made of boiler sheet iron, of good quality, of at least three-sixteenths of an inch in thickness, and must cover the top of such cage in such manner as to afford the greatest protection to life and limb from anything falling down said shaft. It shall be the duty of the mining inspector and his assistant to see that all cages are kept in compliance with this section and to also see that the safety dogs are kept in good order. Every person or corporation failing to comply with any of the provisions of this section is punishable by a fine of not less than three hundred dollars nor more than one thousand dollars.

History: Ap. p. Sec. 705, Pen. C. 1895; amd. Sec. 1, p. 245, L. 1897; en. Sec. 1, Ch. 60, L. 1903; re-en. Sec. 8536, Rev. C. 1907; re-en. Sec. 11268, R. C. M. 1921.

Effect of Failure to Comply on the Ordinary Rules and Standards of Negligence

Where the legislature has declared, as in the above section, that the master shall adopt certain precautions to guard against danger to his employees, the common-law rule of reasonable care is no longer the measure of his duty, and any failure on his part to observe the required precautions is such a breach of duty as will render him liable to the servant for any injury caused to the latter by his dis-

obedience. Monson v. La France Copper Co., 39 M 50, 60, 101 P 243. See Westlake v. Keating Gold Min. Co., 48 M 120, 128, 136 P 38; Ball Ranch Co. v. Hendrickson, 50 M 220, 226, 146 P 278; Kelley v. John R. Daily Co., 56 M 63, 72, 181 P 326.

The failure of a mining company to equip the cage upon which plaintiff was being hoisted with doors, as required by this section, did not deprive said company of the right to interpose the defense of assumption of risk or contributory negligence. Osterholm v. Boston etc. Min. Co., 40 M 508, 527, 107 P 499.

The duty imposed on the employer by this statute is a continuing one, and where the employee has no choice, as where he

is in a deep mining shaft and has no means of egress other than that provided by the employer, and must use a mining cage from which the doors are missing, contrary to the provisions of this section, he will be presumed to have submitted to its use from necessity, and, therefore, not to have assumed the attendant risk. *Monson v. La France Copper Co.*, 43 M 65, 71, 114 P 778.

In an action in which damages were sought to be recovered for the death of a mine employee, charged to have been due to legal negligence of defendant in attempting to hoist him to the surface of the mine in a cage, the doors of which had not been closed as provided in this section, defendant was not, because of the fact that the statute makes omission in this respect punishable by a fine, limited to those defenses available in a criminal action, but could plead any of the defenses ordinarily interposed in negligence cases. *Maronen v. Anaconda Copper Min. Co.*, 48 M 249, 261, 136 P 968.

Inadmissible Evidence on a Prosecution Under This Section

In a prosecution for the violation of this section, evidence that the devices or cages therein referred to would be dangerous is inadmissible, since the question whether such appliances were the best or wisest method is for the legislature to decide. *State v. Anaconda Copper Min. Co.*, 23 M 498, 503, 59 P 854.

"Men" as Used Herein

The word "men" applies to the hoisting or lowering of one man, as well as to the men in a body when going on or off shift. *Osterholm v. Boston etc. Min. Co.*, 40 M 508, 520, 107 P 499.

Nature of Section

This section is penal statute, and its violation is a crime; but the fact that a penalty is attached for its violation does not render the violator immune from civil liability under section 93-2810. *Maronen v. Anaconda Copper Min. Co.*, 48 M 249, 258, 136 P 968.

Operation and Effect

In an action to recover damages for death of an employee by reason of having

fallen out of a cage alleged to be due to defendant's negligence in failing to see that the doors of the cage were in place, the evidence must show that the alleged negligence was the efficient cause of the injury. *Monson v. La France Copper Co.*, 39 M 50, 61, 101 P 243.

Plaintiff, whose limb was crushed by reason of an unguarded door, cannot be said to have waived the absence of the door by a request that it be removed, made by him some three months before the accident, where, between the time it was removed and the date of the injury, he had left the defendant's service, and where in the meantime much sinking had been done, during which operations there was no necessity for a door. *Osterholm v. Boston etc. Min. Co.*, 40 M 508, 522, 107 P 499.

This section does not create any right of action or destroy any defense available at the time of its enactment. *Maronen v. Anaconda Copper Min. Co.*, 48 M 249, 258, 136 P 968.

This section does not make it obligatory upon mine operators to employ a station-tender at each station to open and close the cage doors, where only a small number of miners is engaged in active mining, and does not prohibit, either expressly or impliedly, the imposition of the duty of opening and closing them upon a miner, provided he be capable, understands the method pursued in fulfilling the additional requirement, and is not encumbered with work which would interfere with its discharge. *Maronen v. Anaconda Copper Min. Co.*, 48 M 249, 266, 136 P 968.

Proper Exercise of the Police Power

This section is a proper exercise of the police power of the state; its manifest design being "to guard against the dangers incident to lowering and elevating men in deep mining shafts." *State v. Anaconda Copper Min. Co.*, 23 M 498, 503, 59 P 854; *Monson v. La France Copper Co.*, 39 M 50, 59, 101 P 243.

"Sinking" Defined

The term "sinking" has no application to the cutting of stations, even though the latter operation be a necessary part of the process of sinking. *Osterholm v. Boston etc. Min. Co.*, 40 M 508, 520, 107 P 499.

94-35-127. (11269) Mining—stopping near shaft. It is unlawful for any corporation or person operating any mine in this state worked through a vertical or incline shaft to stope within a less distance than twenty-five feet of the said shaft, when other work is being carried on below said stopping.

History: En. Sec. 1, Ch. 82, L. 1903; re-en. Sec. 8537, Rev. C. 1907; re-en. Sec. 11269, R. C. M. 1921.

94-35-128. (11270) Mining—running cage at excessive speed. It is unlawful for any person or corporation operating any mine in this state worked through a vertical or incline shaft, where a cage or other device is used for the purpose of hoisting or lowering men, to run such cage when men are upon the same at a greater rate of speed than eight hundred feet per minute.

History: En. Sec. 2, Ch. 82, L. 1903;
re-en. Sec. 8538, Rev. C. 1907; re-en. Sec.
11270, R. C. M. 1921.

94-35-129. (11271) Mining—maintaining buildings near mouth of shaft. It is unlawful for any person, company, or corporation to erect or maintain any building or inclosure used for a blacksmith-shop or drying-room within a distance of fifty feet of the mouth of any tunnel or shaft, unless the same shall be fireproof in its construction.

History: En. Sec. 3, Ch. 82, L. 1903;
re-en. Sec. 8539, Rev. C. 1907; re-en. Sec.
11271, R. C. M. 1921.

94-35-130. (11272) Penalties. The penalty for violating the provisions of any of the preceding sections is the same as provided in section 94-35-126, provided, that when it shall appear that any engineer has violated the express order of his employer in running his engine at a greater speed than eight hundred feet per minute, the engineer alone shall be subject to prosecution, and to the fine imposed by the provisions of this act.

History: En. Sec. 4, Ch. 82, L. 1903; Municipal Corporations \S 95.
re-en. Sec. 8540, Rev. C. 1907; re-en. Sec. 43 C.J. Municipal Corporations \S 780.
11272, R. C. M. 1921.

94-35-131. (11580) Mining—penalty for obstructing mining shafts, etc. Any person who shall, in any manner, cast, throw, place in, or cause to enter, fill, obstruct, or partially fill or obstruct, any drift, shaft, tunnel, open cut, or any other opening in or upon any mining-claim or mining property owned, possessed, or lawfully held or claimed by another under the laws of the state of Montana, or under the laws of the United States, or otherwise, any debris, stone, rock, earth, timber, brush, carcass of any dead animal, machinery, appliances, or any other material or thing whatsoever, without the written consent of the person owning or lawfully possessing such mining property or claim, or who shall, in any manner, cause such drift, shaft, tunnel, open cut, or other opening to cave in or otherwise be rendered of less value for use, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail of not less than thirty days nor more than six months, or by both such fine and imprisonment. A conviction under the provisions of this act shall not affect any right to recover damages for the doing of anything herein forbidden, or the commission of any trespass upon a mining claim or property of another.

History: En. Sec. 1, Ch. 123, L. 1921; Mines and Minerals \S 92.
re-en. Sec. 11580, R. C. M. 1921. 40 C.J. Mines and Minerals \S 776 et
seq.

94-35-132. (11273) Mining—protection of underground miners—escape-ment shaft. It is the duty of any person, company, or corporation who shall have sunk on any mine a vertical or incline to a greater depth than one

hundred feet, and who shall have the top of such shaft or hoisting opening covered or enclosed by a shaft or building which is not fireproof, and who shall have drifted on or along the vein or veins thereof a distance of two hundred feet or more, after cross-cutting to the same, and shall have commenced to stope, to provide and maintain to the hoisting shaft or the opening through which men are let into or out of the mine and the ore is extracted, a second escapement shaft, raise, or opening, or an underground opening or communication between every such mine and some other contiguous mine; provided, that in case such contiguous mine belongs to a different person, company, or corporation, the right to use the outlet through such contiguous mine in all cases when necessary, or in cases of accident, must be secured and kept in force. Where such an escapement shaft or opening shall not be in existence at the time that stoping is commenced, work upon such an escapement shaft or opening must be commenced as soon as stoping begins and be diligently prosecuted until the same is completed, and said escapement shaft, raise, or opening shall be continued to and connected with the lowest workings in the mine. The exit, escapement shaft, raise, or opening provided for in the foregoing paragraphs must be of sufficient size as to afford an easy passage-way, and if it be a raise, or shaft, must be provided with good and substantial ladders from the deepest workings to the surface. Whenever the exit or outlet herein provided for is not in a direct or continuous course, signboards, plainly marked, showing the direction to be taken, must be placed at each departure from the continuous course.

History: En. Sec. 1, p. 66, L. 1897; Municipal Corporations § 92.
re-en. Sec. 8541, Rev. C. 1907; re-en. Sec. 43 C.J. Municipal Corporations § 770.
11273, R. C. M. 1921.

94-35-133. (11274) Mining—to what mines applicable. This act shall apply only to quartz mines in which nine or more men are employed underground, and shall not apply to mines not actually extracting ores, by stoping, or to mines in which the shaft or hoisting opening, or hauling-way, is not covered by a shafthouse, and has no building structure within thirty feet of the shaft or opening, nor to mines in which the hoisting shaft or opening shall be covered by or enclosed in a fireproof shaft or building.

History: En. Sec. 2, p. 67, L. 1897;
re-en. Sec. 8542, Rev. C. 1907; re-en. Sec.
11274, R. C. M. 1921.

94-35-134. (11275) Penalty. The penalty for violating any of the provisions of the preceding section is the same as provided in section 94-35-126.

History: En. Sec. 3, p. 67, L. 1897;
re-en. Sec. 8543, Rev. C. 1907; re-en. Sec.
11275, R. C. M. 1921.

94-35-135. (11566.1) Repealed—Chapter 50, laws of 1947.

94-35-136. (11566.2) Repealed—Chapter 50, laws of 1947.

94-35-137. (11046) Minors, admission of, to place of prostitution. Any proprietor, keeper, manager, conductor, or person having the control of any house of prostitution, or any house or room resorted to for the purpose of prostitution, who shall admit or keep any minor of either sex therein, or any parent or guardian of any such minor who shall admit or keep such

minor, or sanction or connive at the admission or keeping thereof into or in any such house or room, shall be guilty of a misdemeanor.

History: En. Sec. 539, Pen. C. 1895; re-en. Sec. 8378, Rev. C. 1907; re-en. Sec. 11046, R. C. M. 1921. Cal. Pen. C. Sec. 309.

Cross-Reference

Enticing to place of prostitution, penalty, sec. 94-3610.

Infants↔20.

43 C.J.S. Infants § 16.

94-35-138. (11039.1) Minors under sixteen—permitting to frequent dance-halls. Every owner, proprietor, manager or employee of a public dance-hall or a place where public dances are held, who encourages or permits a minor under the age of sixteen years to be, remain in, or frequent such hall or place while a public dance is in progress, without being accompanied by his or her parent or legal guardian, shall be guilty of a misdemeanor.

History: En. Sec. 1, Ch. 49, L. 1927.

Infants↔20.

References

43 C.J.S. Infants § 16.

Young v. Board of Trustees et al., 90 M 576, 583, 4 P 2d 725.

94-35-139. (11251) Obstructing attempts to extinguish fires. Every person who, at the burning of a building, disobeys the lawful orders of any public officer or fireman, or offers any resistance to, or interferes with, the lawful efforts of any fireman or any company of firemen to extinguish the same, or engages in any disorderly conduct calculated to prevent the same from being extinguished, or who forbids, prevents, or dissuades others from assisting to extinguish the same, is guilty of a misdemeanor.

History: En. Sec. 687, Pen. C. 1895; re-en. Sec. 8519, Rev. C. 1907; re-en. Sec. 11251, R. C. M. 1921. Cal. Pen. C. Sec. 385.

Fires↔1.

36 C.J.S. Fires §§ 2-5, 9.

94-35-140. (11529) Obstructing ford near ferry. Every person who owns and conducts a ferry, and who obstructs any ford at or near his ferry, or excludes or prevents the public from the free use of such ford, and who in any manner obstructs such ford, is punishable by a fine not exceeding one hundred dollars.

History: Ap. p. Sec. 184, p. 312, Cod. Stat. 1871; re-en. Sec. 184, 4th Div. Rev. Stat. 1879; re-en. Sec. 227, 4th Div. Comp. Stat. 1887; en. Sec. 1160, Pen. C. 1895;

re-en. Sec. 8833, Rev. C. 1907; re-en. Sec. 11529, R. C. M. 1921.

Ferries↔32.

36 C.J.S. Ferries §§ 2, 28.

94-35-141. (10950) Omission of duty by public officer. Every wilful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, or any neglect of duty, where no special provision has been made for the punishment of such delinquency, is punishable as a misdemeanor.

History: En. Sec. 299, Pen. C. 1895; re-en. Sec. 8281, Rev. C. 1907; re-en. Sec. 10950, R. C. M. 1921. Cal. Pen. C. Sec. 176.

202 P 756; Burr v. Winnett Times Publishing Co. et al., 80 M 70, 80, 258 P 242.

References

Officers↔121.

State v. District Court, 61 M 558, 570,

46 C.J. Officers § 346 et seq.

94-35-142. (10951) Offense for which no penalty is prescribed. When an act or omission is declared by a statute to be a public offense, and no

penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor.

History: En. Sec. 300, Pen. C. 1895;
re-en. Sec. 8282, Rev. C. 1907; re-en. Sec.
10951, R. C. M. 1921. Cal. Pen. C. Sec. 177.

Criminal Law ⇨ 1208 (1).
24 C.J.S. Criminal Law §§ 1980, 1986.

94-35-143. (10952) Oppression and injury by an officer. Every officer who, under color of authority, oppresses, wrongs, or injures any person, is guilty of a misdemeanor.

History: En. Sec. 301, Pen. C. 1895;
re-en. Sec. 8283, Rev. C. 1907; re-en. Sec.
10952, R. C. M. 1921.

Officers ⇨ 121.
46 C.J. Officers § 348.

94-35-144. (11526) Officers of fire departments issuing false certificates of exemption. Every officer of a fire department who wilfully issues, or causes to be issued, any certificate of exemption to a person not entitled thereto, is guilty of a misdemeanor.

History: En. Sec. 1157, Pen. C. 1895;
re-en. Sec. 8830, Rev. C. 1907; re-en. Sec.
11526, R. C. M. 1921. Cal. Pen. C. Sec. 649.

Municipal Corporations ⇨ 174.
43 C.J. Municipal Corporations § 1242.

94-35-145. (11248) Oleomargarine. Every person who manufactures for sale, or offers or exposes for sale, or has in his possession with intent to sell any article or substance in resemblance of butter or cheese, not the legitimate product of the dairy, and not made exclusively of milk or cream, or into which the oil or fat of animals not produced from milk enters as a component part, or into which the oil or fat of animals not produced from milk has been introduced to take the place of cream, must distinctly stamp, brand, or mark in some conspicuous place upon every firkin, tub, or package of such article or substance, in plain letters not less than one-fourth inch square each, the word "oleomargarine," or the words "imitation cheese," as the case may be; and in the retail sale of such article or substance, in parcels or otherwise, the seller must deliver to the purchaser therewith a printed label, bearing the plainly printed words "oleomargarine" or "imitation cheese," plainly marked as aforesaid.

History: En. Sec. 684, Pen. C. 1895;
re-en. Sec. 8516, Rev. C. 1907; re-en. Sec.
11248, R. C. M. 1921. Cal. Pen. C. Sec.
383a.

Food ⇨ 13.
36 C.J.S. Food §§ 22, 24.
22 Am. Jur. 842, Food, §§ 51 et seq.
Construction of statute in relation to
marking or branding of containers. 35
ALR 782.

Cross-Reference

Regulations for sale of oleomargarine,
secs. 3-2473 to 3-2475.

Constitutionality of statute in relation
to oleomargarine or other substitute for
butter. 53 ALR 474.

94-35-146. (11249) Same. Every person dealing in the article or substance described in the next preceding section, and every hotel, restaurant, or boarding-house keeper using such article or substance in his business must continuously and conspicuously keep posted up in not less than three exposed positions, in and about his place of business, a printed notice in the following words: "oleomargarine" or "imitation cheese" "sold (or used) here," which notice must be plainly printed with letters not less than two inches square each, and must, upon furnishing the article or substance to his customers or guests, if inquiry is made, distinctly inform each of them

that the article furnished is not butter or cheese, the genuine product of the dairy, but is oleomargarine or imitation cheese.

History: En. Sec. 685, Pen. C. 1895; Food[Ⓒ]8.
re-en. Sec. 8517, Rev. C. 1907; re-en. Sec. 36 C.J.S. Food § 18.
11249, R. C. M. 1921.

94-35-147. (11250) Penalty. Every person and every officer or agent of any corporation who violates any of the provisions of the last two preceding sections is punishable by imprisonment in the county jail not exceeding one month, or by fine not exceeding one hundred dollars.

History: En. Sec. 686, Pen. C. 1895;
re-en. Sec. 8518, Rev. C. 1907; re-en. Sec.
11250, R. C. M. 1921.

94-35-148. (11045) Opium—keeping or resorting to place where used. Every person who opens or maintains, to be resorted to by other persons, any place where opium, or any of its preparations is sold, or given away, to be smoked at such place, and any person who at such place sells or gives away any opium, or its preparations, to be there smoked or otherwise used, and every person who visits or resorts to any such place for the purpose of smoking opium, or its preparations, is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding six months, or both.

History: En. Sec. 1, p. 65, L. 1881; Poisons[Ⓒ]4.
re-en. Sec. 165, 4th Div. Comp. Stat. 1887; 49 C.J. Poisons § 16 et seq.
amd. Sec. 538, Pen. C. 1895; re-en. Sec.
8377, Rev. C. 1907; re-en. Sec. 11045,
R. C. M. 1921. Cal. Pen. C. Sec. 307.

94-35-149. (10926) Personating officer. Any person or persons who shall in this state, without due authority, exercise, or attempt to exercise, the functions of or hold himself or themselves out to any one as a deputy sheriff, marshal, or policeman, constable, or peace officer, shall be deemed guilty of a felony, and, upon conviction thereof, shall, in the discretion of the court or jury, be imprisoned in the penitentiary for any period not less than one year nor more than three years, to which may be added a fine of not less than one hundred dollars nor more than five hundred dollars, together with the costs of prosecution.

History: En. Sec. 4600, Pol. C. 1895; False Personation[Ⓒ]1.
re-en. Sec. 3126, Rev. C. 1907; re-en. Sec. 35 C.J.S. False Personation §§ 1-4.
10926, R. C. M. 1921.

94-35-150. (10927) Penalty for violation of act. Any person, company, or association, who shall violate any of the provisions of this act, shall, upon conviction, be deemed guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term of not less than one year nor more than three years.

History: En. Sec. 4601, Pol. C. 1895; False Personation[Ⓒ]7; Obstructing Jus-
re-en. Sec. 3127, Rev. C. 1907; re-en. Sec. tice[Ⓒ]21.
10927, R. C. M. 1921. 35 C.J.S. False Personation § 4 et seq.;
46 C.J. Obstructing Justice § 68.

94-35-151. (11234) Pesthouse—establishing or keeping within cities, towns, etc. Every person who establishes or keeps, or causes to be established or kept, within the limits of any city, town, or village, any pesthouse,

hospital, or place for persons affected with contagious or infectious diseases, is guilty of a misdemeanor.

History: En. Sec. 675, Pen. C. 1895; re-en. Sec. 8483, Rev. C. 1907; re-en. Sec. 11234, R. C. M. 1921. Cal. Pen. C. Sec. 373.

Operation and Effect

An illustration is found in this section of the frequent legislative use of the term "city or town" without any definite pre-

fix, but under circumstances which would render it absurd to hold that only incorporated cities and towns are meant. State ex rel. Powers v. Dale, 47 M 227, 230, 131 P 670.

Health \Rightarrow 37.

39 C.J.S. Health §§ 30, 31.

94-35-152. (11572) Prison-made goods to be stamped. It shall hereafter be unlawful for any person engaged in the trade of buying and selling or of selling any goods, wares or merchandise or articles or thing to knowingly exhibit or sell or offer for sale any goods, wares, merchandise, article or thing which shall have been produced or manufactured or made by convict labor in any prison, unless such goods shall have plainly stamped or marked thereon the words "prison made."

History: En. Sec. 1, Ch. 32, L. 1911; re-en. Sec. 11572, R. C. M. 1921.

Convicts \Rightarrow 13.

18 C.J.S. Convicts § 26.

41 Am. Jur. 919, Prisons and Prisoners, § 46.

94-35-153. (11573) Same—penalty for violation of act. Any person or persons who shall knowingly sell or offer for sale any goods, wares or merchandise, article or thing produced, made or manufactured in any prison which said goods, wares, merchandise, article or thing shall not have stamped or marked thereon the words "prison made" shall, upon conviction thereof, be deemed guilty of a misdemeanor, and shall be punishable by a fine of not less than twenty-five dollars or more than three hundred dollars, or by imprisonment in the county jail of not less than thirty days or more than ninety days, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 32, L. 1911; re-en. Sec. 11573, R. C. M. 1921.

94-35-154. (11573.1) Sale of goods produced by prisoners unlawful—foreign made goods—exceptions. That on and after January 19, 1934, except as otherwise hereinafter provided, the sale in the open market in this state, of all goods, wares and merchandise manufactured, produced or mined, wholly or in part, by convicts or prisoners, under sentence in the state (except prisoners on parole or probation), or in, or by, any penal or reformatory institution of the state is hereby prohibited. The provisions of this act, and all other regulations and laws of this state in effect at the time and not inconsistent with this act, shall apply to all goods, wares and merchandise manufactured, produced or mined, wholly or in part, by convicts or prisoners outside the state (except prisoners on parole or probation), or in, or by, any penal or reformatory institution of the United States, or any state or foreign country, and transported into this state for use or consumption therein, to the same extent and in the same manner as if such goods and merchandise were so manufactured, produced or mined within the state of Montana: Provided, that where farm machinery now owned in this state requires repairs, and repairs for such machinery is manufactured in whole or in part

without the state of Montana, the sale and transportation into the state of such repairs shall not be prohibited by this act.

History: En. Sec. 1, Ch. 172, L. 1933;
amd. Sec. 1, Ch. 9, Ex. L. 1933.

94-35-155. (11573.2) Same—sale or exchange between penal institutions within state not prohibited. For the purposes of this act the provisions of section 94-35-154, relating to sales in the open market, shall not include the sale or exchange of goods produced in any penal or reformatory institution of the state to or with any other penal or reformatory institution or any charitable or custodial institution, the major portion of whose maintenance is contributed by the state, or any of the political subdivisions thereof for the use or consumption of the persons therein confined.

History: En. Sec. 2, Ch. 172, L. 1933.

94-35-156. (11573.3) Same—interstate sale or exchange between penal institutions prohibited. The exchange of the products of penal or reformatory institutions of this state, as specified in this act, for the products of any other state, is hereby prohibited.

History: En. Sec. 3, Ch. 172, L. 1933.

94-35-157. (11573.4) Production of prison-made goods to be regulated by state board of prison commissioners. The board of state prison commissioners is hereby authorized and directed to make such rules and regulations governing the conduct of industries in the penal and reformatory institutions of the state as will (a) result in the manufacture, mining or production of only such goods, wares and merchandise as may be used or needed in the several penal, custodial, charitable and reformatory institutions, the major portion of whose maintenance is contributed by this state, or any of the political subdivisions thereof, or used and consumed by the persons confined in such institutions; and (b) result in the manufacture at such penal or reformatory institutions of as wide a variety of products as practicable, it being the purpose and intent of this provision to have the products of said institutions so diversified as to prevent the concentration of prison or reformatory labor in any one or few industries, thus to minimize as nearly as may be the possible competition of said industries with private industry and private capital; provided, however, that no goods, wares or merchandise manufactured, produced or mined in or by any penal or reformatory institution of this state shall be shipped outside of this state for sale or exchange, except articles and things made by an inmate of any such institution for his own individual profit.

History: En. Sec. 4, Ch. 172, L. 1933.

Convicts 8.

18 C.J.S. Convicts § 13.

94-35-158. (11573.5) Manufacture of license plates by penal institutions not prohibited—sale of surplus raised exclusively for inmates not prohibited. Nothing herein contained shall be deemed to prevent any of the said institutions from manufacturing motor vehicle number plates, and other articles required or needed by the office of the registrar of motor vehicles, or from preventing any of said institutions selling or disposing of any reasonable

surplus of produce raised exclusively for the use, feeding or maintenance of the inmates of any of said institutions.

History: En. Sec. 5, Ch. 172, L. 1933.

94-35-159. (11573.6) Price of prison-made goods to be same as that of goods manufactured by private industry. The sale price of products made in any penal or reformatory institution for the sale to or the use of any of the institutions hereinbefore mentioned, shall be as nearly as practicable the same as the sale price of similar merchandise manufactured in the private industry.

History: En. Sec. 6, Ch. 172, L. 1933.

Convicts↪13.

18 C.J.S. Convicts § 26.

94-35-160. (11573.7) Regulations concerning sale or exchange of prison-made goods to be made by board of prison commissioners. The board of state prison commissioners shall annually meet and effect such rules and regulations as may be necessary to facilitate the sale and exchange between the institutions hereinbefore mentioned of the goods, wares and merchandise manufactured, produced or mined by them or any of them.

History: En. Sec. 7, Ch. 172, L. 1933.

94-35-161. (11573.8) Sales in open market defined. The words, "sales in the open market," as used in this act, shall mean all sales made to the consuming public, through the medium of stores, shops, sales offices, sales agents or agencies, whether retail or wholesale, or in any other manner.

History: En. Sec. 8, Ch. 172, L. 1933.

94-35-162. (11573.9) Penalty for violation of provisions concerning prison-made goods. Any person or corporation who shall knowingly violate the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars (\$25.00) or more than one thousand dollars (\$1000.00), or by imprisonment in the county jail for a period of not less than ten (10) days or more than six (6) months, or by both such fine and imprisonment.

History: En. Sec. 9, Ch. 172, L. 1933.

94-35-163. (11293) Prizefights. Every person who engages in, instigates, encourages, or promotes any ring or prizefight, or any other premeditated fight or contention (without deadly weapons) either as principal, aid, second, umpire, surgeon or otherwise, is punishable by imprisonment in the state prison not exceeding two years.

History: Ap. p. Sec. 1, p. 108, L. 1885; re-en. Sec. 147, 4th Div. Comp. Stat. 1887; en. Sec. 749, Pen. C. 1895; re-en. Sec. 8573, Rev. C. 1907; re-en. Sec. 11293, R. C. M. 1921. Cal. Pen. C. Sec. 412.

References

Cited or applied as section 749, Penal Code, in *State v. Woodman*, 26 M 348, 355, 67 P 1118.

Cross-Reference

Boxing or wrestling matches, sec. 94-3513.

Prize Fighting↪1.

50 C.J. Prize Fighting § 3.

94-35-164. (11294) Persons present at prizefights. Every person wilfully present as a spectator at any fight or contention mentioned in the preceding section is guilty of a misdemeanor.

History: En. Sec. 750, Pen. C. 1895;
re-en. Sec. 8574, Rev. C. 1907; re-en. Sec.
11294, R. C. M. 1921. Cal. Pen. C. Sec.
413.

References

Cited or applied as section 750, Penal
Code, in *State v. Woodman*, 26 M 348, 355,
67 P 1118.

94-35-165. (11295) Leaving the state to engage in prizefights. Every person who leaves this state with intent to evade any of the provisions of the last two sections, and to commit any act out of this state, such as is prohibited by them, and who does any act which would be punishable under these provisions if committed within this state, is punishable in the same manner as he would have been in case such act had been committed within this state.

History: En. Sec. 751, Pen. C. 1895;
re-en. Sec. 8575, Rev. C. 1907; re-en. Sec.
11295, R. C. M. 1921. Cal. Pen. C. Sec. 414.

94-35-166. (10917) Public administrator, neglect or violation of duty by. Every person holding the office of public administrator, who wilfully refuses or neglects to perform the duties thereof, or who violates any provision of law relating to his duties or the duties of his office, for which some other punishment is not prescribed, is punishable by fine not exceeding five thousand dollars, or imprisonment in the county jail not exceeding two years, or both.

History: En. Sec. 271, Pen. C. 1895;
re-en. Sec. 8253, Rev. C. 1907; re-en. Sec.
10917, R. C. M. 1921. Cal. Pen. C. Sec. 143.

Executors and Administrators⌚24.
33 C.J.S. *Executors and Administrators*
§ 43; 34 C.J.S. *Executors and Administra-*
tors §§ 1050-1053.

94-35-167. (11231) Public nuisances defined. Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance.

History: En. Sec. 672, Pen. C. 1895;
re-en. Sec. 8480, Rev. C. 1907; re-en. Sec.
11231, R. C. M. 1921. Cal. Pen. C. Sec. 370.

References

City of Bozeman v. Merrell, 81 M 19, 29,
261 P 876.

Nuisance⌚59.

46 C.J. *Nuisances* § 1 et seq.

94-35-168. (11232) Unequal damage. Any act which affects an entire community or neighborhood, or any considerable number of persons, as specified in the last section, is no less a nuisance because the extent of the annoyance or damage inflicted upon individuals is unequal.

History: En. Sec. 673, Pen. C. 1895;
re-en. Sec. 8481, Rev. C. 1907; re-en. Sec.
11232, R. C. M. 1921. Cal. Pen. C. Sec. 371.

94-35-169. (10928) Public officers—resisting in the discharge of their duties. Every person who wilfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years.

History: En. Sec. 277, Pen. C. 1895; re-en. Sec. 8259, Rev. C. 1907; re-en. Sec. 10928, R. C. M. 1921. Cal. Pen. C. Sec. 148.

References

Cited or applied as section 8259, Revised Codes, in *State v. Bradshaw*, 53 M 96, 99, 161 P 710.

Obstructing Justice⊖21.

46 C.J. Obstructing Justice § 17 et seq.

39 Am. Jur. 508, Obstructing Justice, §§ 12 et seq.

Dispute over custody as affecting charge of obstructing or resisting arrest. 3 ALR 1290.

What constitutes offense of obstructing or resisting officer. 48 ALR 746.

94-35-170. (10929) Public officers—assault, etc., by, under color of authority. Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years.

History: En. Sec. 278, Pen. C. 1895; re-en. Sec. 8260, Rev. C. 1907; re-en. Sec. 10929, R. C. M. 1921. Cal. Pen. C. Sec. 149.

Assault and Battery⊖64.

6 C.J.S. Assault and Battery § 97.

94-35-171. (11240) Putting extraneous substances in packages of goods usually sold by weight with intent to increase weight. Every person who, in putting up in any bag, bale, box, barrel, or other package, any hops, cotton, wool, grain, hay, or other goods usually sold in bags, bales, boxes, barrels, or packages, by weight, puts in or conceals therein anything whatever, for the purpose of increasing the weight of such bag, bale, box, barrel, or package, with intent thereby to sell the goods therein, or to enable another to sell the same, for an increased weight, is punishable by fine of not less than twenty-five dollars for each offense.

History: En. Sec. 681, Pen. C. 1895; re-en. Sec. 8489, Rev. C. 1907; re-en. Sec. 11240, R. C. M. 1921. Cal. Pen. C. Sec. 381.

Adulteration⊖4.

2 C.J.S. Adulteration §§ 5-10.

94-35-172. (11243) Sale of diseased carcasses without inspection forbidden. It shall be unlawful for any person to sell or offer for sale the carcass or any part of the carcass of an animal having actinomycosis (big jaw), tuberculosis, or any other infectious or contagious disease unless the same shall have been inspected and passed by a representative of the livestock sanitary board or the United States bureau of animal industry.

History: En. Sec. 1, p. 163, L. 1901; re-en. Sec. 8492, Rev. C. 1907; amd. Sec. 1, Ch. 39, L. 1917; re-en. Sec. 11243, R. C. M. 1921.

Cross-Reference

Unsanitarily slaughtered or handled carcasses not to be sold, sec. 46-216.

94-35-173. (11244) Penalty for violation of act. Any person guilty of violating this act shall be guilty of a misdemeanor and upon conviction shall be punishable by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding one year, or by both fine and imprisonment.

History: En. Sec. 2, Ch. 39, L. 1917; re-en. Sec. 11244, R. C. M. 1921.

Food⊖23.

36 C.J.S. Food § 49.

94-35-174. (11278) Railroads—animals killed by. Except as otherwise provided, every person who violates any of the provisions of sections 72-401 to 72-506, relating to livestock killed or injured by railroads, is guilty of a misdemeanor.

History: En. Sec. 720, Pen. C. 1895; re-en. Sec. 8561, Rev. C. 1907; re-en. Sec. 11278, R. C. M. 1921.

Animals⊖45.

3 C.J.S. Animals §§ 236, 237, 241, 242, 246-254.

94-35-175. (11279) Violating railroad regulations. Every person who violates any of the provisions of section 72-219 relating to the regulations of railroad companies must, on conviction of any of the offenses therein named, be punished by a fine not less than five hundred nor more than ten thousand dollars.

History: En. Sec. 721, Pen. C. 1895; which is different from the minimum penalty herein provided.
re-en. Sec. 8562, Rev. C. 1907; re-en. Sec. 11279, R. C. M. 1921.

NOTE.—Section 72-219 provides a minimum penalty for violation of that section
Railroads⇒255 (13).
51 C.J. Railroads § 1111 et seq.

94-35-176. (11254) Railroads—placing passenger cars in front of freight cars. Every person who, in making up or running railroad trains, places or runs, causes to be placed or run, any freight car in the rear of passenger cars, is guilty of a misdemeanor; and if loss of life or limb results from such placing or running, is guilty of felony. The term “freight car” as used in this section does not include a baggage, express or mail car.

History: En. Sec. 691, Pen. C. 1895;
re-en. Sec. 8522, Rev. C. 1907; re-en. Sec. 11254, R. C. M. 1921. Cal. Pen. C. Sec. 392.

94-35-177. (10930) Refusing to aid officers in arrest, etc. Every male person above the age of eighteen years, who neglects or refuses to join the posse comitatus or power of the county, by neglecting or refusing to aid and assist in taking or arresting any person against whom there may be issued any process, or by neglecting to aid and assist in retaking any person who, after being arrested or confined, may have escaped from such arrest or imprisonment, or by neglecting or refusing to aid and assist in preventing any breach of the peace, or the commission of any criminal offense, being thereto lawfully required by any sheriff, deputy sheriff, coroner, constable, judge, or justice of the peace, or other officer concerned in the administration of justice, is punishable by fine of not less than fifty nor more than one thousand dollars.

History: En. Sec. 133, p. 210, Bannack Stat.; re-en. Sec. 150, p. 304, Cod. Stat. 1871; re-en. Sec. 150, 4th Div. Rev. Stat. 1879; re-en. Sec. 175, 4th Div. Comp. Stat. 1887; amd. Sec. 279, Pen. C. 1895; re-en. Sec. 8261, Rev. C. 1907; re-en. Sec. 10930, R. C. M. 1921. Cal. Pen. C. Sec. 150.

Operation and Effect

Construed with other sections to the effect that a county is not liable for services rendered as a member of a sheriff's posse comitatus. *Sears v. Gallatin County*, 20 M 462, 52 P 204.

Id. Members of the sheriff's posse are not officers, nor do they tender official services.

Id. The state, in consideration of its protection extended, may impose upon its inhabitants the duty of rendering it services, at least in an emergency requiring the apprehension of a criminal, or one charged with the commission of a public offense.

References

Westover v. Calder et al., 64 M 264, 272, 209 P 306.

Obstructing Justice⇒1.

46 C.J. Obstructing Justice § 16.

94-35-178. (11298) Refusing to disperse upon lawful command. If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a public officer, the persons so offending are severally guilty of a misdemeanor.

History: En. Sec. 118, p. 206, Bannack Stat.; re-en. Sec. 132, p. 299, Cod. Stat. 1871; re-en. Sec. 132, 4th Div. Rev. Stat. 1879; re-en. Sec. 142, 4th Div. Comp. Stat. 1887; amd. Sec. 754, Pen. C. 1895; re-en.

Sec. 8578, Rev. C. 1907; re-en. Sec. 11298, R. C. M. 1921. Cal. Pen. C. Sec. 416.

Unlawful Assembly 1.

66 C.J. Unlawful Assembly § 18.

94-35-179. (11532) Removing skin from animal. Every person who removes the skin from an animal and leaves the carcass within one-quarter of a mile of a dwelling, is punishable by a fine not exceeding twenty-five dollars.

History: En. Sec. 1168, Pen. C. 1895; re-en. Sec. 8841, Rev. C. 1907; re-en. Sec. 11532, R. C. M. 1921.

Game 7.

38 C.J.S. Game §§ 11-14.

94-35-180. (11301) Returning to take possession of lands after being removed by legal proceedings. Every person who has been removed from any lands by process of law or who has been removed from any lands pursuant to the lawful adjudication or direction of any court, tribunal, or officer, and who afterwards returns to settle, reside upon, or take possession of such lands is guilty of a misdemeanor.

History: En. Sec. 757, Pen. C. 1895; re-en. Sec. 8581, Rev. C. 1907; re-en. Sec. 11301, R. C. M. 1921. Cal. Pen. C. Sec. 419.

Cross-Reference

Reentry as contempt, sec. 93-9802.

Obstructing Justice 6.

46 C.J. Obstructing Justice § 37.

94-35-181. (11285) Riot defined. Any use of force or violence, disturbing the public peace, or any threats to use force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot.

History: En. Sec. 741, Pen. C. 1895; re-en. Sec. 8565, Rev. C. 1907; re-en. Sec. 11285, R. C. M. 1921. Cal. Pen. C. Sec. 404.

Codes, in State v. Driscoll, 49 M 558, 565, 144 P 153.

Riot 1.

54 C.J. Riot § 3.

46 Am. Jur. 127, Riots and Unlawful Assembly, §§ 3 et seq.

References

Cited or applied as section 8565, Revised

94-35-182. (11286) Riot, punishment of. Any person who participates in any riot is punishable by imprisonment in the county jail not exceeding two years, or by a fine not exceeding two thousand dollars, or both.

History: En. Sec. 742, Pen. C. 1895; re-en. Sec. 8566, Rev. C. 1907; re-en. Sec. 11286, R. C. M. 1921. Cal. Pen. C. Sec. 405.

Riot 8.

54 C.J. Riot § 3 et seq.

94-35-183. (11287) Rout defined. Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a rout.

History: En. Sec. 743, Pen. C. 1895; re-en. Sec. 8567, Rev. C. 1907; re-en. Sec. 11287, R. C. M. 1921. Cal. Pen. C. Sec. 406.

Unlawful Assembly 1.

66 C.J. Unlawful Assembly § 2.

46 Am. Jur. 129, Riots and Unlawful Assembly, § 7.

94-35-184. (11281) Sale or manufacture of Maxim silencers and various explosives for wrongful use a felony. Any person who shall make, manufacture, compound, buy, sell, give away, offer for sale or to give away, transport, or have in possession any Maxim silencer, bomb, nitroglycerin, giant, oriental, or thunderbolt powder, dynamite, ballistite, fulgarite, detonite, or any other explosive compound, or any inflammable material, or any instru-

ment or agency, with intent that the same shall be used in this state or anywhere else for the injury or destruction of public or private property, or the assassination, murder, injury, or destruction of any person or persons, either within this state or elsewhere, or knowing that such explosive compounds or such materials, instruments, or agencies are intended to be used by any other person or persons for any such purpose, shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for not less than five years nor more than thirty years, or by a fine of not less than one thousand dollars nor more than twenty-thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 1, Ch. 6, Ex. L. 1918; ExplosivesⒸ4.
re-en. Sec. 11281, R. C. M. 1921. 35 C.J.S. Explosives §§ 4, 12.

94-35-185. (11282) Same—who are principals. All persons aiding, abetting, or in any manner assisting in the manufacture, compounding, buying, selling, offering for sale, or transporting any explosive compounds, or any inflammable material, or any instrument or agency, either by furnishing material or ingredients, or soliciting or contributing money or other property with which to purchase said materials or ingredients, or by assisting by skill or labor, or by acting as agents for the principal, or in any manner aiding as accessories before the fact, knowing that any of such explosive compounds, or such materials, instruments, or agencies are intended to be used by the principals or any other person or persons for any of the purposes mentioned in the preceding section, shall be deemed principals and may be convicted and punished in the same manner and to the same extent as such principal or principals.

History: En. Sec. 2, Ch. 6, Ex. L. 1918;
re-en. Sec. 11282, R. C. M. 1921.

94-35-186. (11283) Same—possession presumptive evidence of what. The possession of any Maxim silencer or bomb of any kind, or chemical compounds intended only for the destruction of life or property, shall be presumptive evidence that the same are intended to be used in the destruction of or injury to property or life, within the meaning of this act.

History: En. Sec. 3, Ch. 6, Ex. L. 1918;
re-en. Sec. 11283, R. C. M. 1921.

94-35-187. (11533) Scabby sheep. Every person who removes from one point to another in any of the counties of this state, or from one county to another, any scabby sheep, or any sheep that have been scabby within one year, without the written certificate of the sheep inspector, or the written consent of all the sheep owners or managers along the route, and in the vicinity of the proposed location, is punishable by a fine not exceeding one thousand dollars. This section does not apply to scabby sheep imported into this state and against which quarantine has been declared.

History: En. Sec. 1169, Pen. C. 1895; AnimalsⒸ34.
re-en. Sec. 8842, Rev. C. 1907; re-en. Sec. 11533, R. C. M. 1921. 3 C.J.S. Animals § 59.

94-35-188. (11536) Receiving and transporting diseased sheep. Every person who, after the publication of the proclamation of the governor of this state prohibiting the importation of diseased sheep into this state, knowingly receives any such sheep from any of the prohibited districts, or transports

the same within the limits of the state, is punishable by a fine not exceeding five hundred dollars.

History: En. Sec. 1172, Pen. C. 1895;
re-en. Sec. 8845, Rev. C. 1907; re-en. Sec.
11536, R. C. M. 1921.

94-35-189. (11537) Moving diseased sheep. Every person in charge of sheep being shipped into this state, against which quarantine has been declared, as specified in the last preceding section, and fails to notify the deputy inspector of the county in which such sheep are brought, or allows any such sheep to pass over or upon any public highway, or upon the ranges occupied by other sheep, or within five miles of any corral in which sheep are regularly corralled, before such sheep are inspected as provided by law, is punishable by a fine not exceeding five hundred dollars.

History: En. Sec. 1173, Pen. C. 1895;
re-en. Sec. 8846, Rev. C. 1907; re-en. Sec.
11537, R. C. M. 1921.

94-35-190. (11538) Importing diseased cattle into state. Every person who imports into this state any cattle, horses, mules, or asses, after the governor has made proclamation holding in quarantine for the purpose of inspection for contagious or infectious diseases, such animals, and allows the same or any of them to leave the place of their first arrival in this state, until they have been examined by the state veterinary surgeon, and a certificate has been obtained therefrom that such animals are free from disease, or permits any such animals to run at large, or to be removed, or to escape before such certificate has been received, is punishable by a fine not exceeding five hundred dollars. This section does not apply to any animals driven in harness, or under yoke, or ridden by their owners into this state.

History: En. Sec. 1174, Pen. C. 1895;
re-en. Sec. 8847, Rev. C. 1907; re-en. Sec.
11538, R. C. M. 1921.

94-35-191. (11534) Infected animals—bringing into state. Every person who brings into this state sheep infected with scab or other infectious disease, or any horses, mules, asses or cattle infected with any contagious disease, is punishable by a fine not exceeding five hundred dollars.

History: En. Sec. 1170, Pen. C. 1895;
re-en. Sec. 8843, Rev. C. 1907; re-en. Sec.
11534, R. C. M. 1921.

94-35-192. (11539) Receiving or transporting diseased cattle. Every person who, after the publication of such proclamation, knowingly receives or transports within the limits of this state, any animal mentioned in section 94-35-190, before the certificate mentioned therein has been given, is punishable by a fine not exceeding ten thousand dollars.

History: En. Sec. 1175, Pen. C. 1895;
re-en. Sec. 8848, Rev. C. 1907; re-en. Sec.
11539, R. C. M. 1921.

94-35-193. (11535) State veterinary surgeon — disobeying orders of. Every person who fails to comply with or disregards any lawful order or direction made by the state veterinary surgeon, or deputy, or deputy sheep inspector, under the provisions of the code, concerning scab and other con-

tagious diseases among sheep, or to prevent the spread of disease among cattle, is punishable by a fine not exceeding five hundred dollars.

History: En. Sec. 1171, Pen. C. 1895;
re-en. Sec. 8844, Rev. C. 1907; re-en. Sec.
11535, R. C. M. 1921.

94-35-194. (11540) Obstructing veterinary surgeon, etc. Every person who owns or has the custody of any cattle, horses, mules or asses infected with a contagious disease, and fails to immediately report the same to the state veterinary surgeon, or conceals the existence of such disease, or attempts so to do, or wilfully obstructs or resists the said veterinary surgeon in the discharge of his duty as provided by law, or sells, gives away or uses the meat or milk, or removes the skin or any part of such animal, is punishable by a fine not exceeding five hundred dollars.

History: En. Sec. 1176, Pen. C. 1895;
re-en. Sec. 8849, Rev. C. 1907; re-en. Sec.
11540, R. C. M. 1921.

94-35-195. (11527) School teachers—abuse of. Every parent, guardian, or other person, who upbraids, insults, or abuses any teacher of the public schools, in the presence or hearing of a pupil thereof, is guilty of a misdemeanor.

History: En. Sec. 1158, Pen. C. 1895;
re-en. Sec. 8831, Rev. C. 1907; re-en. Sec.
11527, R. C. M. 1921. Cal. Pen. C. Sec.
653b.

Cross-Reference

Abuse of teachers, sec. 75-2408.

94-35-196. (11541) Selling horses, etc., at auction — recording sales. Every person who sells at auction any horses, mules, asses, or cattle, and fails to record in a book the name of the person who offers for sale said animals, the names of the owners with their residences, the color, brand, mark, size, and age of the animal offered for sale, or fails to keep said book open for the inspection of any person, is punishable by a fine not exceeding fifty dollars. This section does not apply to judicial sales.

History: En. Sec. 1177, Pen. C. 1895;
re-en. Sec. 8850, Rev. C. 1907; re-en. Sec.
11541, R. C. M. 1921.

Auctions and Auctioneers ⇨ 13.

7 C.J.S. Auctions and Auctioneers § 17.

94-35-197. (11043) Selling merchandise at camp-meeting. Every person who erects or keeps a booth, tent, stall, or other contrivance for the purpose of selling or otherwise disposing of any article of merchandise, or who peddles or hawks about any such article within one mile of any camp or field meeting for religious worship during the time of holding such meeting is punishable by a fine of not less than five nor more than five hundred dollars.

History: En. Sec. 535, Pen. C. 1895;
re-en. Sec. 8374, Rev. C. 1907; re-en. Sec.
11043, R. C. M. 1921.

94-35-198. (11044) Limitation of preceding section. The provisions of the preceding section do not apply to a person carrying on a regular business in the sale of articles of merchandise which business was established prior to the appointment of the meeting referred to in the last section.

History: En. Sec. 536, Pen. C. 1895;
re-en. Sec. 8375, Rev. C. 1907; re-en. Sec.
11044, R. C. M. 1921.

94-35-199. (11239) **Selling opium, etc.** Every person who sells, or in any way disposes of, to another person, any morphine, opium, cocaine, chloralhydrate, or any of their compounds, except to a licensed physician, or on the authority of a certificate of such licensed physician, or fails to keep on file at his place of business any such certificate for inspection of all persons, after the same has been surrendered to him by the buyer of any such drugs, or uses or fills out any such certificate more than once for the benefit of the person presenting the same, or any other person, is punishable by fine not exceeding two hundred dollars. The provisions of this section do not apply to the sale of paregoric or any other mild compound of any of such drugs, nor do they apply to persons who are sick and in actual need of any of such drugs as a medicine.

History: En. Sec. 680, Pen. C. 1895; re-en. Sec. 8488, Rev. C. 1907; re-en. Sec. 11239, R. C. M. 1921.

Superseded in Part

Held, that section 3189, R. C. M. 1921 (repealed), enacted in 1921 as section 1, Chapter 202, Laws of 1921, prohibiting the sale, inter alia, of coca leaves or a derivative thereof, supersedes section 3186, enacted in 1911 (omitted), and this section, enacted in 1895, so far as it comprehends or conflicts with the subject matter of the two latter sections, and that the trial

court's holding that an information charging the unlawful sale "of cocaine, a derivative of coca leaves" was based upon that section was correct. *State v. Wong Fong*, 75 M 81, 83, 241 P 1072; *State v. Brennan*, 89 M 479, 481 et seq., 300 P 273.

Poisons⇒4.

49 C.J. Poisons § 16 et seq.

Harrison Narcotic Act. 13 ALR 858.

Constitutionality, construction, and application of Uniform Narcotic Drug Act. 119 ALR 1399.

94-35-200. (11550) **Shepherd—abandonment of sheep by—penalty.** Every person who, having, by virtue of his employment as herder, driver or otherwise, the charge or custody of any sheep, shall wilfully abandon the same, or allow them to stray from his charge or custody, shall, upon conviction, be punished by a fine of not less than one hundred dollars, or by imprisonment of not less than three months nor more than one year, or by both such fine and imprisonment; provided, that if the person so in the charge or custody of such sheep shall have given to the owner of such sheep, or his authorized agent, at least five days' notice of his intention to quit his employment, he shall not be deemed to have abandoned such sheep, within the meaning of this act, by leaving the same after the expiration of such period.

History: En. Sec. 1, Ch. 116, L. 1909; re-en. Sec. 11550, R. C. M. 1921.

Master and Servant⇒18.

39 C.J. Master and Servant § 35 et seq.

94-35-201. (11568) **Stealing rides upon cars or locomotives.** It shall be and hereby is declared to be a misdemeanor for any person to enter upon, ride upon, or secure passage upon, any railroad car or locomotive or tender, of any description, other than a car used exclusively for the carriage of passengers, with intent thereby to obtain a ride without payment therefor, or fraudulently obtain carriage upon any such car, locomotive or tender.

History: En. Sec. 1, p. 150, L. 1899; re-en. Sec. 8882, Rev. C. 1907; re-en. Sec. 11568, R. C. M. 1921.

Carriers⇒22.

13 C.J.S. Carriers §§ 526, 542, 650.

94-35-202. (11569) **Stealing rides on trucks, rods or brakebeams.** It shall be and is hereby declared to be a misdemeanor for any person excepting railroad employes in the performance of their duty, to take passage or ride

upon, or enter for the purpose of taking passage or riding upon, the trucks, rods, brakebeams, or any part of any car, locomotive, or tender not ordinarily and customarily used, or intended for the resting place of a person riding upon or operating the same.

History: En. Sec. 2, p. 150, L. 1899;
re-en. Sec. 8883, Rev. C. 1907; re-en. Sec.
11569, R. C. M. 1921.

94-35-203. (11570) Trainmen constituted peace officers. Every conductor, engineer or other person in charge of the operation of cars or trains, or locomotives, upon any railroad, is, while so engaged or employed, hereby constituted a public executive officer, of the class of peace officers, and of the grade of a constable in each county wherein his train or car, or cars, or locomotives may from time to time happen to be, and is hereby given the same authority as other peace officers to with or without a warrant arrest and prosecute persons violating any provision of this act; provided, however, that the persons mentioned herein shall not be entitled to receive fees for any arrest or prosecution which may be made or prosecuted under this act. And provided further, that none of the persons herein named shall be authorized to hold said office or exercise its functions unless at the time he shall be a citizen of the United States, and shall have been a citizen of this state for at least one year next preceding his exercising the functions thereof.

History: En. Sec. 3, p. 150, L. 1899; Arrest \hookrightarrow 63 (2).
re-en. Sec. 8884, Rev. C. 1907; re-en. Sec. 6 C.J.S. Arrest § 6.
11570, R. C. M. 1921.

94-35-204. (11552.1) Stolen livestock—seizure and confiscating of vehicle used to transport. The use of any vehicle for the transportation of any stolen sheep, cow, calf, heifer, steer, bull, hogs, poultry, or the products of either thereof, shall be unlawful and such vehicle shall be forfeited to and confiscated by the state. Any such vehicle found in such use, or upon probable cause believed to be devoted wholly or in part to such use, shall be seized and held and, upon conviction in a proceeding in the name of the state of Montana against such vehicle or against such vehicle and the owner before any district court or judge thereof, shall be confiscated and sold; provided that such vehicle shall not be confiscated, or subject to forfeiture, if the same be a stolen vehicle at the time it is used for such unlawful transportation and the owner thereof is not in collusion with the party or parties guilty of the theft.

History: En. Sec. 1, Ch. 80, L. 1931. Forfeitures \hookrightarrow 3.
37 C.J.S. Forfeitures § 3.

94-35-205. (11552.2) Same—payment of prior liens and disposal of proceeds. The officer making the sale, after deducting the expenses of keeping the property and the cost of the sale, so far as the balance of sale proceeds permit, shall pay all liens, according to their priorities, which are established, by intervention or otherwise in said proceedings, as being bona fide and as having been created without the lienor having any notice or reasonable cause to believe that the vehicle was being or was to be used for such illegal transportation, and shall pay the balance of the proceeds to the

treasurer of the state of Montana to be credited to the livestock commission fund.

History: En. Sec. 2, Ch. 80, L. 1931. Forfeitures \hookrightarrow 10.
37 C.J.S. Forfeitures §§ 8, 9.

94-35-206. (11552.3) Same—service of process. Service of process in such proceeding for confiscation of such vehicle shall conform as far as practicable with the provisions of sections 93-3007 to 93-3015, both inclusive; provided, that insofar as the proceeding against the vehicle is concerned no copy of the summons or complaint need be mailed and no showing need be made under the provisions of said section 93-3013, and the service shall be complete upon publication.

History: En. Sec. 3, Ch. 80, L. 1931. Forfeitures \hookrightarrow 5.
37 C.J.S. Forfeitures § 5.

94-35-207. (11552.4) Same—sale to be at public auction. Such sale shall be at public auction and otherwise in the manner of sales of personal property under execution, and may be made by any sheriff, livestock inspector, or other peace officer.

History: En. Sec. 4, Ch. 80, L. 1931.

94-35-208. (11047) Selling tobacco to minors. Every person who sells or gives any tobacco, cigars, cigarettes, or cigarette paper to any minor under eighteen years of age, is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars, nor more than five hundred dollars, or imprisonment not to exceed three months in the county jail, or both such fine and imprisonment, in the discretion of the court.

History: En. Sec. 542, Pen. C. 1895;
re-en. Sec. 8381, Rev. C. 1907; re-en. Sec.
11047, R. C. M. 1921. Cal. Pen. C. Sec. 308.

94-35-209. Solicitation of certain foreign claims prohibited. Whoever obtains or solicits, for himself or another, employment in asserting outside the state of Montana any claim or right of action that arose within the state for death or personal injury in favor of a resident of the state and against a resident thereof or a corporation subject to service of process therein, is guilty of a misdemeanor.

History: En. Sec. 1, Ch. 100, L. 1945.

94-35-210. Prima facie evidence of violation of act. Proof of the solicitation of employment in asserting such claim or right of action, coupled with the commencement outside the state of an action to recover damages thereon, is prima facie evidence of a violation of section 94-35-209.

History: En. Sec. 2, Ch. 100, L. 1945.

94-35-211. (11195) Steam-boilers—mismanagement of. Every engineer or other person having charge of any steam-boiler, steam-engine, or other apparatus for generating or employing steam, used in any manufactory, steamboat, railway, mining, milling, or other mechanical works, who wilfully or from ignorance, or gross neglect, creates, or allows to be created, such an undue quantity of steam as to burst or break the boiler, or engine or ap-

paratus, or cause any other accident whereby human life is endangered, is guilty of a felony.

History: En. Sec. 632, Pen. C. 1895; Steam↔1.
re-en. Sec. 8443, Rev. C. 1907; re-en. Sec. 60 C.J. Steam § 2.
11195, R. C. M. 1921. Cal. Pen. C. Sec. 349.

94-35-212. (11196) Steam-boilers—operating without license a misdemeanor. Every person who operates any steam-boiler or steam-engine without first obtaining a license from the boiler inspector or assistant boiler inspector, as required by law, and every owner, employer, or manager of any steam-engine or boiler who knowingly permits any unlicensed engineer to operate any steam-boilers or steam-engines where a license is required, or who operates or causes to be operated any steam-engine or boiler without having the same inspected and the inspector's certificate issued thereon as required by law, or who violates any of the provisions of sections 69-1501 to 69-1518 shall be deemed guilty of a misdemeanor and, upon conviction thereof, where no other punishment is prescribed, shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail of not exceeding six months, or by both such fine and imprisonment.

History: En. Sec. 633, Pen. C. 1895; Steam↔3.
re-en. Sec. 8444, Rev. C. 1907; amd. Sec. 17, 60 C.J. Steam § 2.
Ch. 30, L. 1913; re-en. Sec. 11196, R. C. M.
1921.

94-35-213. (11197) Unsafe steam-boilers. Every owner, renter, or user of a steam-boiler, who uses a boiler or steam-engine which has become unsafe from any cause, or has been notified by the boiler inspector or his assistant that such boiler or steam-engine is unsafe from any defect, or that repairs are necessary, and after such notice uses the same, is punishable by imprisonment in the county jail not exceeding three months, or by fine not exceeding two hundred and fifty dollars, or both.

History: En. Sec. 634, Pen. C. 1895;
re-en. Sec. 8445, Rev. C. 1907; re-en.
Sec. 11197, R. C. M. 1921.

94-35-214. (11198) False certificate of boiler inspector. If the state boiler inspector, or assistant inspector, wilfully and falsely certifies regarding any steam-boiler, steam-engine, or its attachments, or grants a license to any person to act as engineer, contrary to law, he is punishable by imprisonment not exceeding one year in the county jail, or by a fine not exceeding five hundred dollars, or both.

History: En. Sec. 635, Pen. C. 1895; Cross-Reference
re-en. Sec. 8446, Rev. C. 1907; re-en. Sec. Wrongful issuance of boiler inspection
11198, R. C. M. 1921. certificate, sec. 69-1511.

Steam↔4.
60 C.J. Steam § 2.

94-35-215. (11261) Suicide—aiding or encouraging, a felony. Every person who deliberately aids, or advises or encourages another to commit suicide is guilty of a felony.

History: En. Sec. 698, Pen. C. 1895; Suicide↔3.
re-en. Sec. 8529, Rev. C. 1907; re-en. Sec. 60 C.J. Suicide § 4.
11261, R. C. M. 1921. Cal. Pen. C. Sec. 401.

94-35-216. (11039) Sunday—certain activities on, forbidden. Every person who on Sunday, or the first day of the week, keeps open or maintains, or who aids in opening or maintaining any dance-hall, dance-house, racetrack, gambling-house or pool-room, variety-hall, or any other place of amusement where any intoxicating liquors are sold or dispensed, is guilty of a misdemeanor; provided, however, that the provisions of this section shall not apply to such dancing-halls or pavilions as are maintained or conducted in public parks or playgrounds where no admission is charged, and where good order is maintained, and where no intoxicating liquors are sold.

History: En. Sec. 1, p. 519, Cod. Stat. 1871; re-en. Sec. 849, 5th Div. Rev. Stat. 1879; re-en. Sec. 1406, 5th Div. Comp. Stat. 1887; amd. Sec. 530, Pen. C. 1895; re-en. Sec. 8369, Rev. C. 1907; amd. Sec. 1, Ch. 92, L. 1915; re-en. Sec. 11039, R. C. M. 1921. Cal. Pen. C. Sec. 299.

Cross-Reference

Barber business not conducted on Sunday, sec. 94-3511.

Constitutionality

It is competent for the legislature to recognize different degrees of the possible evil tendencies inherent in different forms of amusement or entertainment, and classify the subjects for the purpose of appropriate regulation, without being open to the charge that the Act is arbitrary or unwarranted; and in making selections for classification a wide latitude is permitted. *State v. Loomis*, 75 M 88, 92, 242 P 344.

Id. Under the above, held that this section, prohibiting the keeping open of dance-halls, dance-houses, etc., on Sunday, is not invalid as making an arbitrary classification between dance-halls and theaters by exempting the latter places of amusement from the operation of the Act, although prior thereto they had been included in one class subject to police regulation.

Id. The state has the right to prescribe the territorial limits within which dance-houses or dance-halls may be conducted on Sunday; therefore this section, providing that a dance-hall or pavilion in a public park or playground may operate on Sunday under certain conditions, while one located outside thereof must remain closed on that day, does not arbitrarily discriminate between subjects of the same class, but does create two distinct classes based upon location, and hence is not objectionable

as denying the equal protection of the law.

"Dance-House"

A dance-house or dance-hall is a place maintained for promiscuous and public dancing, the rules for admission to which are not based upon personal selection or invitations. *State v. Loomis*, 75 M 88, 92, 242 P 344.

Operation and Effect

This section, prohibiting the operation of dance-halls, dance-houses, etc., on Sunday, "or any other place of amusement where any intoxicating liquors are sold", construed, on application for writ of habeas corpus, and held, in view of the history of the legislation on Sunday observance and the rule of construction *infra*, to interdict the operation of a dance-hall on Sunday, even though intoxicating liquors are not sold therein. In *re Klune*, 74 M 332, 333, 240 P 286.

In view of the fact that the legislature has by statute recognized public dances as proper forms of public entertainment, subject only to reasonable regulation, it may not be said that the renting of school buildings for such dances is contrary to public policy. *Young v. Board of Trustees et al.*, 90 M 576, 583, 4 P 2d 725.

References

Cited or applied as section 8369, Revised Codes, before amendment, in *State v. Penny*, 42 M 118, 119, 111 P 727.

Sunday—6 (1).

60 C.J. Sunday § 48 et seq.

Work, labor, avocation, business, or the like, sports, games, or amusements as with-in Sunday laws. 4 ALR 382.

Sunday laws with respect to dance halls and dancing. 48 ALR 177.

94-35-217. (11242) Tainted food—disposing of. Every person who sells, or keeps for sale, or otherwise disposes of any article of food, drink, drug, or medicine, knowing that the same has become tainted, decayed, spoiled, or otherwise unwholesome, or unfit to be eaten or drunk, with intent to permit the same to be eaten or drunk, is guilty of a misdemeanor.

History: En. Sec. 683, Pen. C. 1895; Druggists 12; Food 14.
 re-en. Sec. 8491, Rev. C. 1907; re-en. Sec. 28 C.J.S. Druggists §§ 5, 12, 14; 36 C.J.S.
 11242, R. C. M. 1921. Cal. Pen. C. Sec. 383. Food §§ 22, 25.

94-35-218. (11516) Telegraph messages—neglect or postponement. Every agent, operator, or employee of any telegraph office who wilfully refuses or neglects to send any message received at such office for transmission, or wilfully postpones the same out of its order, or wilfully refuses or neglects to deliver any message received by telegraph, is guilty of a misdemeanor. Nothing herein contained shall be construed to require any message to be received, transmitted or delivered, unless the charges thereon have been paid or tendered, or to require the sending, receiving, or delivering of any message counseling, aiding, abetting, or encouraging treason against the government of the United States or of this state, or other resistance to lawful authority, or any message calculated to further any plan or purpose, or to instigate or encourage the perpetration of any unlawful act, or facilitate the escape of any criminal or person accused of crime.

History: En. Sec. 1150, Pen. C. 1895; Telegraphs and Telephones 79.
 re-en. Sec. 8823, Rev. C. 1907; re-en. Sec. 62 C.J. Telegraphs and Telephones § 145
 11516, R. C. M. 1921. Cal. Pen. C. Sec. 638. et seq.

Cross-Reference

Duty to deliver message, sec. 8-418.

94-35-219. (11517) Employee using information from messages. Every agent, operator, or employee of any telegraph office, who in any way uses or appropriates any information derived by him from any private message passing through his hands, and addressed to another person, or in any other manner acquired by him by reason of his trust as such agent, operator, or employee, or trades or speculates upon any such information so obtained, or in any manner turns, or attempts to turn, the same to his own account, profit, or advantage, is punishable by imprisonment in the state prison not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both fine and imprisonment.

History: En. Sec. 1151, Pen. C. 1895; **References**
 re-en. Sec. 8824, Rev. C. 1907; re-en. Sec. Cited or applied as section 8824, Revised
 11517, R. C. M. 1921. Cal. Pen. C. Sec. 639. Codes, in Lahood v. Continental Tel. Co.,
 52 M 313, 319, 157 P 639.

94-35-220. (11518) Clandestinely learning the contents of a telegram. Every person who, by means of any machine, instrument, or contrivance, or in any other manner, wilfully and fraudulently reads, or attempts to read, any message, or learn the contents thereof, while the same is being sent over any telegraph line, or wilfully and fraudulently, or clandestinely, learns or attempts to learn the contents or meaning of any message, whilst the same is in any telegraph office, or is being received thereat or sent therefrom, or who uses or attempts to use, or communicates to others, any information so obtained, is punishable as provided in the preceding section.

History: En. Sec. 1152, Pen. C. 1895; **Cross-Reference**
 re-en. Sec. 8825, Rev. C. 1907; re-en. Sec. Disclosing contents of message, sec. 94-
 11518, R. C. M. 1921. Cal. Pen. C. Sec. 640. 3321.

94-35-221. (11519) Bribing telegraphic operator. Every person who, by the payment or promise of any bribe, inducement, or reward, procures or

attempts to procure any telegraph agent, operator or employee to disclose any private message, or the contents, purport, substance, or meaning thereof, or offers to any such agent, operator, or employee any bribe, compensation or reward, for the disclosure of any private information received by him by reason of his trust as such agent, operator, or employee or uses or attempts to use any such information so obtained, is punishable as provided in section 94-35-219.

History: En. Sec. 1153, Pen. C. 1895; See generally, 8 Am. Jur. 885, Bribery.
re-en. Sec. 8826, Rev. C. 1907; re-en. Sec.
11519, R. C. M. 1921. Cal. Pen. C. Sec. 641.

94-35-222. (11310) Toy pistols and similar appliances—selling or dealing in. Any person who shall sell, trade, exchange, or give away, or offer to sell, trade, exchange, or give away, or who shall have the possession of, what is known as toy pistols, toy cannons, cap pistols, explosive canes, or other devices or appliances for the use of blank cartridges or caps containing chlorate of potash mixture or other explosive substance; or any blank cartridge, paper caps, or other explosive substance prepared for, used in, or intended for use in toy pistols, cap pistols, explosive canes, or other such appliances, shall be guilty of a misdemeanor.

History: En. Sec. 1, Ch. 70, L. 1911; Weapons⇒4.
re-en. Sec. 11310, R. C. M. 1921. 68 C.J. Weapons § 81.

94-35-223. (11311) Same — public nuisance — duty of officers. Toy pistols, toy cannons, cap pistols, explosive canes, and all such devices and appliances designated in the preceding section are hereby declared to be a public nuisance, and it shall be the duty of every officer authorized to make arrests, to seize every such toy pistol, article, and device, and bring the same before a committing magistrate.

History: En. Sec. 2, Ch. 70, L. 1911; Nuisance⇒61.
re-en. Sec. 11311, R. C. M. 1921. 46 C.J. Nuisances § 74 et seq.

94-35-224. (11312) Same—magistrate to destroy. The magistrate before whom such toy pistol, article, or device is brought must cause the public destruction of the same, and no person owning or claiming to own any such toy pistol, article, or device shall have any right of action against any person or against the state, county, or city for the value of such article or for damages for the destruction thereof.

History: En. Sec. 3, Ch. 70, L. 1911; Nuisance⇒78.
re-en. Sec. 11312, R. C. M. 1921. 46 C.J. Nuisances § 365 et seq.

94-35-225. (11313) Duty of mayor. It shall be the duty of every mayor of every town or city in the state, to cause this act to be diligently enforced, and to cause the police officers of his city or town to arrest and make complaint against any and all persons offending against any of the provisions of this act.

History: En. Sec. 4, Ch. 70, L. 1911; Municipal Corporations⇒168.
re-en. Sec. 11313, R. C. M. 1921. 43 C.J. Municipal Corporations § 1193 et seq.

94-35-226. (11199) Trademarks—forging and counterfeiting of, a misdemeanor. Every person, association, or corporation who knowingly or wilfully forges or counterfeits, or procures to be forged or counterfeited, any trademark or name used and recorded by any person in connection with his

goods, or affixed thereto to distinguish them from the goods of any other person; or any person, association, or corporation who shall make use of any trademark or name, or anything similar thereto, which has been recorded in the office of the secretary of state for any other person, association, or corporation—with intent to palm off on the public any goods to which said forged, counterfeit, or similar trademark or name is affixed, as the goods of such person whose trademark or name is recorded—is guilty of a misdemeanor and subject to the penalty therefor provided—it being the intent of this act that any person owning or using a recorded trademark or name shall be protected in the exclusive use thereof.

History: En. Sec. 636, Pen. C. 1895; re-en. Sec. 8447, Rev. C. 1907; amd. Sec. 1, Ch. 94, L. 1913; re-en. Sec. 11199, R. C. M. 1921. Cal. Pen. C. Sec. 350.

Trade-Marks and Trade-Names and Unfair Competition § 48.

63 C.J. Trade-Marks, Trade-Names, and Unfair Competition § 144.

31 Am. Jur. 871, Labor, §§ 91 et seq.

See generally, 14 Am. Jur. 173, Counterfeiting; 23 Am. Jur. 673, Forgery.

94-35-227. (11200) Trademarks—selling goods which bear counterfeit.

Every person who sells or keeps for sale any goods upon or to which any counterfeited trademark has been affixed, after such trademark has been recorded in the office of the secretary of state, intending to represent such goods as the genuine goods of another, knowing the same to be counterfeited, is guilty of a misdemeanor.

History: En. Sec. 637, Pen. C. 1895; re-en. Sec. 8448, Rev. C. 1907; re-en. Sec. 11200, R. C. M. 1921. Cal. Pen. C. Sec. 351.

31 Am. Jur. 871, Labor, §§ 91 et seq.

See generally, 14 Am. Jur. 173, Counterfeiting; 23 Am. Jur. 673, Forgery.

Trade-Marks and Trade-Names and Unfair Competition § 49.

63 C.J. Trade-Marks, Trade-Names, and Unfair Competition § 145.

Entrapment to commit the crime of selling goods bearing counterfeit labels. 18 ALR 162.

94-35-228. (11201) Definition of the phrase “counterfeit trademarks,” etc. The phrases “forged trademark” and “counterfeit trademark,” or their equivalents, as used in this chapter, include every alteration or imitation of any trademark so resembling the original as to be likely to deceive.

History: En. Sec. 638, Pen. C. 1895; re-en. Sec. 8449, Rev. C. 1907; re-en. Sec. 11201, R. C. M. 1921. Cal. Pen. C. Sec. 352.

94-35-229. (11202) “Trademark” defined. The phrase “trademark,” as used in the three preceding sections, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, wrapper, usually affixed by any mechanic, manufacturer, druggist, merchant, or tradesman to denote any goods to be goods imported, manufactured, produced, compounded, or sold by him, other than any name, word, or expression generally denoting any goods to be of some particular class or description.

History: En. Sec. 639, Pen. C. 1895; re-en. Sec. 8450, Rev. C. 1907; re-en. Sec. 11202, R. C. M. 1921. Cal. Pen. C. Sec. 353.

94-35-230. (11203) Refilling casks, etc., bearing trademark. Every person who has or uses any cask, bottle, siphon, vessel, case, box-cover, label, or other thing bearing or having in any way connected with it the duly filed

trademark or name of another, for the purpose of disposing, with intent to deceive or defraud, of any article other than that which such cask, vessel, bottle, case, cover, label, or other thing originally contained, or was connected with, by the owner of such trademark or name, is guilty of a misdemeanor.

History: En. Sec. 640, Pen. C. 1895; re-en. Sec. 8451, Rev. C. 1907; re-en. Sec. 11203, R. C. M. 1921. Cal. Pen. C. Sec. 354.

94-35-231. (11204) Counterfeiting certain trademarks. Whenever any person, association, or union of workmen have adopted or shall hereafter adopt, for their protection any label, trademark, or form of advertisement announcing that goods to which such label, trademark, or form of advertisement shall be attached were manufactured by such person or by a member or members of such association or union, it shall be unlawful for any person or corporation to counterfeit or imitate such label, trademark, or form of advertisement. Every person violating this section shall, upon conviction, be guilty of a misdemeanor.

History: En. Sec. 641, Pen. C. 1895; re-en. Sec. 8452, Rev. C. 1907; re-en. Sec. 11204, R. C. M. 1921. 31 Am. Jur. 871, Labor, §§ 91 et seq. See generally, 14 Am. Jur. 173, Counterfeiting; 23 Am. Jur. 673, Forgery.

94-35-232. (11205) Penalty for unlawfully using trademark. Every person who shall use any counterfeit or imitate any label, trademark, or form of advertisement of any such person, union, or association, knowing the same to be counterfeit or imitation, shall be guilty of a misdemeanor.

History: En. Sec. 642, Pen. C. 1895; re-en. Sec. 8453, Rev. C. 1907; re-en. Sec. 11205, R. C. M. 1921.

94-35-233. (11206) Record of certain trademarks. Every such person, association, or union that heretofore adopted, or shall hereafter adopt, a label, trademark, or form of advertisement as aforesaid, may file the same for record in the office of the secretary of state, by leaving two copies, counterparts or facsimiles thereof, with the secretary of state; said secretary shall deliver to such person, association, or union filing the same a duly attested certificate of the record of the same, for which he shall receive a fee of one dollar. Such certificate of record shall in all suits and prosecutions under this act be sufficient proof of the adoption of such label, trademark, or form of advertisement, and of the right of said person, association, or union to adopt the same. No label shall be recorded that probably would be mistaken for a label already of record.

History: En. Sec. 643, Pen. C. 1895; re-en. Sec. 8454, Rev. C. 1907; re-en. Sec. 11206, R. C. M. 1921. Trade-Marks and Trade-Names and Unfair Competition § 43. 63 C.J. Trade-Marks, Trade-Names, and Unfair Competition § 140 et seq.

94-35-234. (11207) Suits to protect certain trademarks. Every such person, association, or union adopting a label, trademark, or form of advertisement, as aforesaid, may proceed by suit to enjoin the manufacture, use, display, or sale of any such counterfeit or imitation, and all courts having jurisdiction thereof shall grant injunctions to restrain such manufacture, use, display, or sale, and shall award the complainant in such suit such damages resulting from such wrongful manufacture, use, display, or sale as may

by said court be deemed just and reasonable, and shall require the defendants to pay such person, association, or union the profits derived from such wrongful manufacture, use, display, or sale; and said court shall also order that all such counterfeits or imitations in the possession or under the control of any defendant in such case be delivered to any officer of the court or to complainant to be destroyed.

History: En. Sec. 644, Pen. C. 1895; re-en. Sec. 8455, Rev. C. 1907; re-en. Sec. 11207, R. C. M. 1921.

Cross-Reference

Injunction to restrain unauthorized use, sec. 85-104.

Actual and Exemplary Damages—Proof Required

In an action for damages for the fraudulent use of a trademark (in which injunction also was sought) plaintiff must prove that the acts of defendant amounted to a wilful misrepresentation calculated to injure plaintiff, or were actuated by a desire to deceive customers so that defendant's business would be increased thereby; in the instant case, the facts shown were held to warrant a verdict of \$750 actual damages where plaintiff expended \$1,627 combating defendant by radio and advertising; exemplary damages, which cannot be assessed unless actual damages are awarded (sec. 17-208), herein awarded on a six to one ratio, \$5000, held not excessive. *Truz-*

zolino Food Products Co. v. F. W. Woolworth Co., 108 M 408, 420, 91 P 2d 415.

Suit for Injunction and Damages—Trial by Jury Not Error

Where in an action by the manufacturer of tamales protected by a trademark, to enjoin the owner of a store from fraudulently advertising and selling the same article manufactured by a different concern as plaintiff's product (equitable relief), but in addition complained of pecuniary loss sustained by reason of defendant's acts and a claim for damages, the court in trying the cause as an action at law with the aid of a jury did not err in overruling defendant's objection to trial by jury. *Truzzolino Food Products Co. v. F. W. Woolworth Co.*, 108 M 408, 416, 91 P 2d 415.

Trade-Marks and Trade-Names and Unfair Competition—79 et seq.

63 C.J. Trade-Marks, Trade-Names, and Unfair Competition § 231 et seq.

94-35-235. (11208) Penalties. Every person who shall use or display the genuine label, trademark, or form of advertisement of any such person, association, or union in any manner not authorized by such person, union, or association, shall be deemed guilty of a misdemeanor. In all cases where such association or union is not incorporated, suits under this act may be commenced and prosecuted by any officer or member of such association or union on behalf of and for the use of such association or union.

History: En. Sec. 645, Pen. C. 1895; re-en. Sec. 8456, Rev. C. 1907; re-en. Sec. 11208, R. C. M. 1921.

94-35-236. (11209) Same. Any person or persons who shall in any way use the name or seal of any person, association, or union, or officer thereof, in and about the name of goods or otherwise, not being authorized to use the same, shall be guilty of a misdemeanor.

History: En. Sec. 646, Pen. C. 1895; re-en. Sec. 8457, Rev. C. 1907; re-en. Sec. 11209, R. C. M. 1921.

94-35-237. (11225) Trespassing stock. It shall be unlawful for any person or persons to wilfully drive, or cause to be driven, any livestock held in herd on or over any field, ranch property, or valid claim in process of title under any of the land laws of the United States, or under lease from the state of Montana, whether the same be fenced or not; provided, that any lands so owned, or under process of title, or under lease, and not fenced, shall

be clearly defined by suitable monuments or stakes, and plough-furrows, with printed or written notices indicating the lands so held.

History: En. Sec. 1, Ch. 103, L. 1903; re-en. Sec. 8474, Rev. C. 1907; re-en. Sec. 11225, R. C. M. 1921.

one's animals upon the lands of another, whether such lands are protected by an enclosure or not. *Herrin v. Sieben*, 46 M 226, 234, 127 P 323.

Operation and Effect

The provisions of this and the following section do not annul the rule of civil liability for trespasses in driving or herding

Animals⇒91.

3 C.J.S. Animals §§ 185-187.

94-35-238. (11226) Penalty for trespassing stock. Any violation of the provisions of this act shall render the owner, lessee, employee, or other person in control, or herder of such stock so driven or herded, or permitted to enter upon the property referred to in the preceding section, subject to a fine of not less than twenty-five dollars nor more than five hundred dollars.

History: En. Sec. 2, Ch. 103, L. 1903; re-en. Sec. 8475, Rev. C. 1907; amd. Sec. 1, Ch. 41, L. 1921; re-en. Sec. 11226, R. C. M. 1921.

Codes, in *Herrin v. Sieben*, 46 M 226, 233, 127 P 323.

References

Cited or applied as section 8475, Revised

Animals⇒102.

3 C.J.S. Animals §§ 208, 209, 236, 237, 240, 244, 246-254.

94-35-239. (11227) Fines belong to school fund. All fines collected under the provisions of this act shall be converted into the school funds of the county in which the action is brought.

History: En. Sec. 3, Ch. 103, L. 1903; re-en. Sec. 8476, Rev. C. 1907; re-en. Sec. 11227, R. C. M. 1921.

Fines⇒20.

36 C.J.S. Fines § 19.

94-35-240. (11228) When act applicable. This act is not intended, and shall not apply to stock on range not held in herd, or not in charge of a herder.

History: En. Sec. 4, Ch. 103, L. 1903; re-en. Sec. 8477, Rev. C. 1907; re-en. Sec. 11228, R. C. M. 1921.

94-35-241. (10949) Unauthorized communication with convict. Every person, not authorized by law, who, without the consent of the warden or other officer in charge of the state prison, communicates with any convict therein, or brings into or conveys out of the state prison any letter or writing to or from any convict, is guilty of a misdemeanor.

History: En. Sec. 298, Pen. C. 1895; re-en. Sec. 8280, Rev. C. 1907; re-en. Sec. 10949, R. C. M. 1921. Cal. Pen. C. Sec. 171.

Prisons⇒17½.

50 C.J. Prisons § 52.

94-35-242. (11288) Unlawful assembly defined. Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or to do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.

History: Ap. p. Sec. 120, p. 206, Ban-nack Stat.; re-en. Sec. 134, p. 300, Cod. Stat. 1871; re-en. Sec. 134, 4th Div. Rev. Stat. 1879; re-en. Sec. 144, 4th Div. Comp. Stat. 1887; en. Sec. 744, Pen. C. 1895;

re-en. Sec. 8568, Rev. C. 1907; re-en. Sec. 11288, R. C. M. 1921. Cal. Pen. C. Sec. 407.

46 Am. Jur. 130, Riots and Unlawful Assembly, § 10.

94-35-243. (11289) **Punishment of rout and unlawful assembly.** Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor.

History: En. Sec. 745, Pen. C. 1895; re-en. Sec. 8569, Rev. C. 1907; re-en. Sec. 11289, R. C. M. 1921. Cal. Pen. C. Sec. 408.	Cross-Reference Unlawful assembly, punishment, sec. 94-4407.
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94-35-244. (11290) **Remaining present at place of riot, etc., after warning to disperse.** Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

History: En. Sec. 746, Pen. C. 1895;
re-en. Sec. 8570, Rev. C. 1907; re-en. Sec.
11290, R. C. M. 1921. Cal. Pen. C. Sec. 409.

94-35-245. (11291) **Magistrate neglecting or refusing to disperse rioters.** If a magistrate having notice of an unlawful or riotous assembly, mentioned in this chapter, neglects to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is vested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor.

History: En. Sec. 144, p. 303, Cod. Stat. 1871; re-en. Sec. 144, 4th Div. Rev. Stat. 1879; re-en. Sec. 159, 4th Div. Comp. Stat. 1887; amd. Sec. 747, Pen. C. 1895; re-en. Sec. 8571, Rev. C. 1907; re-en. Sec. 11291, R. C. M. 1921. Cal. Pen. C. Sec. 410.	Cross-Reference Officer's liability for neglect, sec. 94-5314. Justices of the Peace—30. 51 C.J.S. Justices of the Peace § 23.
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94-35-246. (11559) **Unlawful entries in races.** It is hereby made unlawful in this state for any person or persons knowingly to enter or cause to be entered for competition or to compete for any purse, prize, premium, stake or sweepstakes offered or given by any agricultural or other society, association, person or persons or to drive any horse, mare, gelding, colt or filly under an assumed name or out of its proper class where such purse, prize, premium, stake or sweepstakes, is to be decided by a contest of speed. Any person or persons found guilty of a violation of this section shall, upon conviction thereof, be imprisoned in the penitentiary for a period of not more than three years, or imprisoned in the county jail of the county in which the accused may be convicted for any period not more than six months, and shall be fined in any sum not exceeding one thousand dollars.

History: En. Sec. 1195, Pen. C. 1895; re-en. Sec. 8869, Rev. C. 1907; re-en. Sec. 11559, R. C. M. 1921.	Theaters and Shows—9. 62 C.J. Theaters and Shows § 93.
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References

Toomey v. Penwell et al., 76 M 166, 171,
245 P 943.

94-35-247. (11560) **Name of racehorse.** The name of any horse, for the purpose of entry for competition in any contest of speed, shall not be changed after having once contested for a prize, purse, premium, stake or sweepstakes, except as provided by the code of rules of the society or association under which the contest is advertised to be conducted. The class to which a horse belongs, for the purpose of an entry in any such contest

of speed, shall be determined by the public performance of said horse in any former contest or trial of speed as provided by the rules of the society under which the proposed contest is advertised to be conducted. And any person or persons knowingly misrepresenting or fraudulently concealing the public performance of any former contest or trial of speed of any horse which he or they propose to enter for competition in any such contest, shall, upon conviction thereof, be liable to the same punishment as provided in the preceding section, whether he or they shall succeed in making said entry or not.

History: En. Sec. 1196, Pen. C. 1895; re-en. Sec. 8870, Rev. C. 1907; re-en. Sec. 11560, R. C. M. 1921.

References

Toomey v. Penwell et al., 76 M 166, 171, 245 P 943.

94-35-248. (11521) Vagrants. 1. Every person (except an Indian) without visible means of living, who has the physical ability to work, and who does not seek employment, or labor when employment is offered him;

2. Every healthy beggar who solicits alms as a business;

3. Every person who roams about from place to place without any lawful business;

4. Every idle or dissolute person, or associate of known thieves, who wanders about the streets at late or unusual hours of the night, or who lodges in any barn, shed, outhouse, vessel, or place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof;

5. Every lewd and dissolute person, who lives in and about houses of ill-fame, or who lives with or upon the earnings of a woman of bad repute; and,

6. Every common prostitute and common drunkard,

is a vagrant, and punishable by imprisonment in the county jail not exceeding ninety days.

History: Ap. p. Sec. 1, p. 81, L. 1881; re-en. Sec. 242, 4th Div. Comp. Stat. 1887; en. Sec. 1155, Pen. C. 1895; re-en. Sec. 8828, Rev. C. 1907; re-en. Sec. 11521, R. C. M. 1921. Cal. Pen. C. Sec. 647.

Operation and Effect

A prosecution for vagrancy in a police court must be instituted and conducted in the name of the state. State ex rel. City of Butte v. District Court, 37 M 202, 204, 95 P 841.

Vagrancy—1.

66 C.J. Vagrancy § 4.

55 Am. Jur. 445, Vagrancy, §§ 1 et seq.

Constitutionality of statute requiring persons, regardless of financial condition, to engage in some business, profession, occupation, or employment. 9 ALR 1366.

What amounts to vagrancy. 14 ALR 1482.

Constitutionality of vagrancy statutes and ordinances. 111 ALR 68.

What constitutes vagrancy within statute making vagrancy grounds for divorce. 135 ALR 854.

94-35-249. Vending or coin operated machines—operation with counterfeit slugs, etc., forbidden. Any person who, by means of any token, slug, false or counterfeited coin, or by any other means, method, trick or device whatsoever not lawfully authorized by the owner, lessee, or licensee of any lawful vending machine, coin-box telephone or other receptacle designed to receive or be operated by lawful coin of the United States of America in furtherance of or connection with the sale, use or enjoyment of property or service, knowingly shall operate or cause to be operated, or shall attempt to operate or attempt to cause to be operated, any lawful vending machine,

coin-box telephone or other receptacle designed to receive or be operated by lawful coin of the United States of America, or whoever shall take, obtain, accept or receive, from or by means of any such machine, coin-box telephone or other receptacle, any article of value of service or the use or enjoyment of any telephone, telegraph or other facility or service, without depositing in, delivering to and payment into such machine, coin-box telephone or receptacle the amount of lawful coin of the United States of America required therefor by the owner, lessee or licensee of such machine, coin-box telephone or other receptacle, shall be fined not more than two hundred dollars (\$200.00), or imprisoned not more than sixty (60) days, or both.

History: En. Sec. 1, Ch. 83, L. 1945.

94-35-250. Penalty for manufacturing tokens, etc., for unlawful use.

Any person who knowingly or having cause to believe that the same is intended for fraudulent or unlawful use on the part of the purchaser, donee or user thereof shall manufacture for sale, sell or give away any token, slug, blank, disc, tag, planchet, false, mutilated, sweated or counterfeited coin or any device or substance whatsoever intended or calculated to be placed, deposited or used or which may be so placed, deposited or used in any lawful vending machine, coin-box telephone or other receptacle designed to receive or be operated by lawful coin of the United States of America in furtherance or connection with the sale, use or enjoyment of the property or service or the use or enjoyment of any telephone, telegraph or other facilities or service, shall be fined not more than two hundred dollars (\$200.00), or imprisoned not more than sixty (60) days, or both.

History: En. Sec. 2, Ch. 83, L. 1945.

94-35-251. (11255) Violation of duty by employees of railroad companies.

Every engineer, conductor, brakeman, switchtender, or other officer, agent, or servant of any railroad company, who is guilty of any wilful violation or omission of his duty as such officer, agent, or servant, whereby human life or safety is endangered, the punishment of which is not otherwise prescribed, is guilty of a misdemeanor.

History: En. Sec. 692, Pen. C. 1895; re-en. Sec. 8523, Rev. C. 1907; re-en. Sec. 11255, R. C. M. 1921. Cal. Pen. C. Sec. 393.

94-35-252. (11256) Violation of duty by railroads. Every person or corporation who owns, carries on, or has control of a railroad and fails to observe any of the regulations or requirements or perform any of the duties prescribed by law in reference to railroads, the penalty for which is not otherwise provided for in this code, is punishable by a fine not exceeding five thousand dollars.

History: En. Sec. 693, Pen. C. 1895; re-en. Sec. 8524, Rev. C. 1907; re-en. Sec. 11256, R. C. M. 1921.

of-way free from combustible material, his damages are compensatory only. *Cooper v. Northern Pacific Ry. Co.*, 212 Fed. 533, 535.

Operation and Effect

If a person is injured by the failure of a railroad company to comply with section 72-501, with reference to keeping the right-

References

Cited or applied as section 8524, Revised Codes, in *John v. Northern Pacific Ry. Co.*, 42 M 18, 37, 111 P 632.

94-35-253. (11558) Wearing certain uniforms prohibited. Every person, other than an officer or enlisted man of the national guard of the state

of Montana, or of any other state, or of the United States army or navy, marine corps or revenue service or forest service, or instructor, or student in a military school, or inmate of any veterans' or soldiers' home, who at any time wears the uniform of the United States army or navy or national guard, or any part of such uniform, or a uniform or part of a uniform similar thereto, within the bounds of the state of Montana, is guilty of a misdemeanor, and if found guilty of such offense shall be punishable by a fine of not less than one hundred nor more than two hundred and fifty dollars, or by imprisonment in the county jail not exceeding sixty days, or by both such fine and imprisonment; provided, that nothing in this act shall be construed as prohibiting persons of the theatrical profession from wearing such uniform in any playhouse or theater while actually engaged in following said profession, and provided, that nothing in this act shall be construed as prohibiting the uniform rank of civic societies parading or traveling in a body or assembling in a lodge room; and provided, further, that whenever the national guard, or any part thereof is in active service, or is called into active service, no civic organization or member thereof shall parade or appear in uniform in the locality where said national guard is in service.

History: En. Sec. 1, Ch. 58, L. 1909; Army and Navy \S 40 (5).
re-en. Sec. 11558, R. C. M. 1921. 6 C.J.S. Army and Navy \S 39.

94-35-254. (11571) Wearing mask or disguise. It is unlawful for any person to wear any mask, false whiskers, or any personal disguise (whether complete or partial) for the purpose of

1. Evading or escaping discovery, recognition or identification in the commission of any public offense.

2. Concealment, flight or escape when charged with, arrested for, or convicted of any public offense. Any person violating any of the provisions of this section is guilty of a misdemeanor.

History: En. Sec. 324, Pen. C. 1895; Escape \S 1.
re-en. Sec. 8288, Rev. C. 1907; re-en. Sec. 30 C.J.S. Escape $\S\S$ 1, 5, 6, 7.
11571, R. C. M. 1921. Cal. Pen. C. Sec. 185.

94-35-255. (11194) Wilfully poisoning food, medicine or water. Every person who wilfully mingles any poison with any food, drink, or medicine, with intent that the same shall be taken by any human being to his injury, and every person who wilfully poisons any well, spring, or reservoir of water, is punishable by imprisonment in the state prison for a term not less than one nor more than ten years.

History: En. Sec. 631, Pen. C. 1895; Poisons \S 7.
re-en. Sec. 8442, Rev. C. 1907; re-en. Sec. 49 C.J. Poisons \S 33 et seq.
11194, R. C. M. 1921. Cal. Pen. C. Sec. 347.

94-35-256. (11220) Workmen—false representation to procure. It shall be unlawful for any person or persons, society, company, association, corporation, or organization of any kind doing business in this state to induce, influence, persuade, or engage workmen to change from one place to another in this state, through or by means of deception, misrepresentation, and false advertising concerning the kind or character of the work, or the sanitary or other conditions of employment, or as to the existence of a strike or other trouble pending between the employer and the employees, at the time of, or

immediately prior to, such engagement. Failure to state in any advertisement, proposal, or contract for the employment of workmen that there is a strike, lockout, or other labor trouble at the place of the proposed employment, when in fact such strike, lockout, or other trouble then actually exists at such place, shall be deemed a false advertisement and misrepresentation for the purpose of this act.

History: En. Sec. 1, Ch. 80, L. 1903;
re-en. Sec. 8469, Rev. C. 1907; re-en. Sec.
11220, R. C. M. 1921.

94-35-257. (11221) Same—penalty. Every person, company, corporation, society, association, or organization of any kind doing business in this state, violating any of the provisions of this act, is punishable by a fine of not less than one hundred dollars nor more than two thousand dollars.

History: En. Sec. 2, Ch. 80, L. 1903;
re-en. Sec. 8470, Rev. C. 1907; re-en. Sec.
11221, R. C. M. 1921.

NOTE.—See sec. 94-3556 for right of action for damages resulting from the acts prohibited above.

CHAPTER 36

OBSCENITY—LITERATURE—INDECENT EXPOSURE—HOUSES OF ILL FAME—PROHIBITION OF CERTAIN ADVERTISEMENTS

- Section** 94-3601. Obscene literature not to be given to or sold by minors.
94-3602. Penalty.
94-3603. Indecent exposures, exhibitions and pictures.
94-3604. Seizure of indecent articles authorized.
94-3605. Their character to be summarily determined.
94-3606. Their destruction.
94-3607. Keeping or residing in a house of ill fame.
94-3608. Keeping disorderly houses.
94-3609. Advertising to produce miscarriage.
94-3610. Enticing to place of gambling or prostitution.
94-3611. Prohibition against a certain class of advertisements.
94-3612. Distribution of circulars.
94-3613. Penalties.
94-3614. Same.
94-3615. Production of advertisement prima facie evidence of guilt.
94-3616. Contraceptives, sex-inciting devices, articles for prevention of venereal disease, sale or disposal of, prohibited, when.
94-3617. Contraceptives and prophylactics, advertising of, forbidden.
94-3618. Seizure of illegal stock authorized.
94-3619. Penalty for violation of act.

94-3601. (11134) Obscene literature not to be given to or sold by minors. It is unlawful for any person to sell, lend, give away, or show, or have in his possession with intent to sell or give away or to show or advertise or otherwise offer for loan, gift, or distribution, to any minor child, under the age of sixteen years, any book, pamphlet, magazine, newspaper, lewd picture, story paper, or other printed paper, devoted to the publication or principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of lust or crime. It is unlawful to exhibit upon any street or highway, or in any place within the view of any minor child under the age of sixteen years, or to hire, use, employ, or permit such child to sell or give away or in any manner distribute any such book, pamphlet, magazine, lewd picture, newspaper, story paper, or publication.

History: En. Secs. 1, 2, p. 255, L. 1891; 8391, Rev. C. 1907; re-en. Sec. 11134, R. amd. Sec. 560, Pen. C. 1895; re-en. Sec. C. M. 1921.

Obscenity⊖5.

46 C.J. Obscenity § 17 et seq.

33 Am. Jur. 20, Lewdness, Indecency, and Obscenity, §§ 9 et seq.

Scientific, educational, or instructive publications regarding sex relations as within

statutes relating to obscene or immoral publications. 76 ALR 1099.

What amounts to an obscene play or book within prohibition statute. 81 ALR 801.

94-3602. (11135) Penalty. Every person violating any of the provisions of the next preceding section is guilty of a misdemeanor.

History: En. Sec. 561, Pen. C. 1895; re-en. Sec. 8392, Rev. C. 1907; re-en. Sec. 11135, R. C. M. 1921.

Obscenity⊖5.

46 C.J. Obscenity § 29 et seq.

94-3603. (11136) Indecent exposures, exhibitions and pictures. Every person who wilfully and lewdly either:

1. Exposes his person, or the private parts thereof, in any public place or in any place where there are other persons present to be offended or annoyed thereby; or,

2. Procures, counsels, or assists any person to expose himself, or to take part in any model artist exhibition, or to make any other exhibition of himself to public view, or to the view of any number of persons such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts; or,

3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book, or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print, or moulds, cuts, casts, or otherwise makes any obscene or indecent figure; or,

4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print, or figure; or,

5. Sings any lewd or obscene song, ballad, or other words in any public place or in any place where there are persons present to be annoyed thereby, is guilty of a misdemeanor.

History: En. Sec. 562, Pen. C. 1895; re-en. Sec. 8393, Rev. C. 1907; re-en. Sec. 11136, R. C. M. 1921. Cal. Pen. C. Sec. 311.

33 Am. Jur., Lewdness, Indecency, and Obscenity, p. 19, § 7; p. 20, §§ 9 et seq.

Criminal offense predicated upon indecent exposure. 93 ALR 996.

Validity, construction and application of statutes or ordinances relating to wearing apparel or lack of it. 110 ALR 1233.

Obscenity⊖3, 5, 6.

46 C.J. Obscenity §§ 5 et seq., 23.

94-3604. (11137) Seizure of indecent articles authorized. Every person who is authorized or enjoined to arrest any person for a violation of subdivision three of the last section, is equally authorized and enjoined to seize any obscene or indecent writing, paper, book, picture, print, or figure found in possession, or under the control of the person so arrested, and to deliver the same to the magistrate before whom the person so arrested, is required to be taken.

History: En. Sec. 563, Pen. C. 1895; re-en. Sec. 8394, Rev. C. 1907; re-en. Sec. 11137, R. C. M. 1921. Cal. Pen. C. Sec. 312.

Obscenity⊖22.

46 C.J. Obscenity § 45.

94-3605. (11138) Their character to be summarily determined. The magistrate to whom any obscene or indecent writing, paper, book, picture,

print or figure is delivered pursuant to the foregoing section must, upon the examination of the accused, or, if the examination is delayed or prevented, without awaiting such examination, determine the character of such writing, paper, book, picture, print or figure, and if he finds it to be obscene or indecent, he must deliver one copy to the county attorney of the county in which the accused is liable to trial, and must at once destroy all the other copies.

History: En. Sec. 564, Pen. C. 1895; 11138, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8395, Rev. C. 1907; re-en. Sec. 313.

94-3606. (11139) Their destruction. Upon the conviction of the accused, such county attorney must cause any writing, paper, book, picture, print or figure, in respect whereof the accused stands convicted and which remains in the possession or under the control of such county attorney, to be destroyed.

History: En. Sec. 565, Pen. C. 1895; 11139, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8396, Rev. C. 1907; re-en. Sec. 314.

94-3607. (11140) Keeping or residing in a house of ill fame. Every person who keeps a house of ill fame in this state, resorted to for the purposes of prostitution or lewdness or who wilfully resides in such house is guilty of a misdemeanor.

History: En. Sec. 566, Pen. C. 1895; Codes, in *Andrieux v. City of Butte*, 44 re-en. Sec. 8397, Rev. C. 1907; re-en. Sec. M 557, 121 P 291.
11140, R. C. M. 1921. Cal. Pen. C. Sec. 315.

References

Cited or applied as section 8397, Revised

Disorderly House 5, 7.

27 C.J.S. Disorderly Houses §§ 5, 7.

17 Am. Jur. 103, Disorderly Houses.

94-3608. (11141) Keeping disorderly houses. Every person who keeps any disorderly house or any house for the purpose of assignation or prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner, and every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, is guilty of a misdemeanor.

History: En. Sec. 567, Pen. C. 1895; re-en. Sec. 8398, Rev. C. 1907; re-en. Sec. 11141, R. C. M. 1921. Cal. Pen. C. Sec. 316.

Cross-References

Abatement of building as nuisance, secs.

94-1002 to 94-1011.

Prostitution, secs. 94-4109 to 94-4117.

94-3609. (11142) Advertising to produce miscarriage. Every person who wilfully writes, composes or publishes any notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for the prevention of conception, or who offers his services by any notice, advertisement or otherwise, to assist in the accomplishment of such purpose is guilty of a misdemeanor.

History: En. Sec. 568, Pen. C. 1895; re-en. Sec. 8399, Rev. C. 1907; re-en. Sec. 11142, R. C. M. 1921. Cal. Pen. C. Sec. 317.

Obscenity 7.

46 C.J. Obscenity § 3 et seq.

94-3610. (11143) Enticing to place of gambling or prostitution. Whoever through invitation or device prevails upon any person to visit any room,

building, or other places kept for the purpose of gambling or prostitution is guilty of a misdemeanor.

History: En. Sec. 569, Pen. C. 1895; re-en. Sec. 8400, Rev. C. 1907; re-en. Sec. 11143, R. C. M. 1921. Cal. Pen. C. Sec. 318.

Persuading persons to visit gambling resorts, penalty, sec. 94-2407.
Procuring women for house of ill fame, secs. 94-4110, 94-4111.

Cross-References

Admission of minor to place of prostitution, sec. 94-35-137.

Gaming↗77; Prostitution↗1.
38 C.J.S. Gaming §§ 1, 107.

94-3611. (11144) Prohibition against a certain class of advertisements. No newspaper or other paper published or circulated in whole or in part within the state of Montana shall contain advertisements of cures, appliances, or treatments for certain diseases or disorders, to-wit: stricture, syphilis, impotency, gonorrhoea, emissions, and so-called "lost manhood," and other private diseases of men and women, and their complications.

History: En. Sec. 1, Ch. 191, L. 1907; Sec. 8401, Rev. C. 1907; re-en. Sec. 11144, R. C. M. 1921.

94-3612. (11145) Distribution of circulars. It is hereby made unlawful to distribute any circulars, dodgers or advertising matter whatsoever advertising remedies for the cure of any of the diseases mentioned in section 94-3611.

History: En. Sec. 2, Ch. 191, L. 1907; Sec. 8402, Rev. C. 1907; re-en. Sec. 11145, R. C. M. 1921.

94-3613. (11146) Penalties. The person advertising, as well as the proprietor, editor, or any person in charge of any newspaper or printing establishment, violating any of the provisions of this act shall be guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than six months.

History: En. Sec. 3, Ch. 191, L. 1907; Sec. 8403, Rev. C. 1907; re-en. Sec. 11146, R. C. M. 1921.

94-3614. (11147) Same. Any person publishing, distributing, or causing to be distributed or circulated, any of the advertising matter hereinabove prohibited shall be guilty of a misdemeanor and punished as prescribed in the preceding section.

History: En. Sec. 4, Ch. 191, L. 1907; Sec. 8404, Rev. C. 1907; re-en. Sec. 11147, R. C. M. 1921.

94-3615. (11148) Production of advertisement prima facie evidence of guilt. The production of any advertisement or advertising matter published or distributed contrary to the provisions of this act shall be, of itself, prima facie evidence of the guilt of the person or persons advertising to cure any such disease hereinabove mentioned, or of the publisher who publishes any matter such as is herein prohibited.

History: En. Sec. 5, Ch. 191, L. 1907; Sec. 8405, Rev. C. 1907; re-en. Sec. 11148, R. C. M. 1921.

Obscenity↗17.
46 C.J. Obscenity § 9.

94-3616. (11148.1) Contraceptives, sex-inciting devices, articles for prevention of venereal disease, sale or disposal of, prohibited, when. It shall be unlawful for any person, firm, corporation, co-partnership, or association to sell, offer for sale, or give away, through the medium of vending machines, personal or collective distribution, by solicitation, peddling or in any other manner whatsoever, contraceptive devices, prophylactic rubber goods, articles for the prevention of venereal diseases, and other infections, or any sex-inciting devices or contrivance in the state of Montana. The foregoing provisions shall not apply to regularly licensed practitioners of medicine, osteopathy or other licensed persons practicing other healing arts, and registered pharmacists of the state of Montana, nor to wholesale drug jobbers or manufacturers who sell to the retail stores only.

History: En. Sec. 1, Ch. 134, L. 1935.

1 Am. Jur. 133, Abortion, §§ 5, 6.

Revocation of license of physician or surgeon because of giving information as to contraception. 82 ALR 1186.

Validity of statute or ordinance forbidding or regulating sale or advertisement of contraceptives or abortives, or dissemination of birth control information. 113 ALR 970.

94-3617. (11148.2) Contraceptives and prophylactics, advertising of, forbidden. It shall be unlawful to exhibit or display prophylactics or contraceptives in any show window, upon the streets, or in any public place other than in the place of business of a licensed pharmacist, or to advertise such in any magazine, newspaper or other form of publication, originating in, or published within the state of Montana; to publish, or distribute from house to house or upon the streets, any circular, booklet or other form of advertising, or by other visual means, or by auditory method or by radio broadcast; or by the use of outside signs on stores, billboards, window displays or other advertising visible to persons upon the streets or public highways; provided, however, that nothing in this act shall prevent the advertising of prophylactics or contraceptives in the trade press of those magazines whose principal circulation is to the medical and pharmaceutical professions; or to those magazines and other publications having interstate circulation, originating outside of the state of Montana where the advertising does not violate any United States law or Federal postal regulation; nor to the furnishing within the store or place of business of a licensed pharmacist, to persons qualified to purchase, and then only upon their inquiry, such printed or other information as is requisite to proper use in relation to any merchandise coming within the provisions of this act.

History: En. Sec. 2, Ch. 134, L. 1935.

94-3618. (11148.3) Seizure of illegal stock authorized. Any officer of the law shall have the power to cause the arrest of any person violating any provisions of this act; to seize stocks so illegally held, and to make seizure of any mechanical device or vending machine containing any merchandise coming within the provisions of this act, holding the owner of such machine, the occupier and the owner of the premises where seizure is made, to be in violation of this act.

History: En. Sec. 3, Ch. 134, L. 1935.

Obscenity—22.

46 C.J. Obscenity § 45.

94-3619. (11148.4) Penalty for violation of act. Any person, or any member of a firm, or co-partnership, or the officers of a corporation or asso-

ciation who, or which knowingly violates any of the provisions of this act shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine not to exceed five hundred dollars (\$500.00), or by imprisonment of, not to exceed six (6) months in the county jail, or both; provided, however, that the justice of the peace courts and the district courts of the state shall have concurrent jurisdiction in all prosecutions and causes arising under this act.

History: En. Sec. 4, Ch. 134, L. 1935.

CHAPTER 37

PAWNBROKERS—PROHIBITIONS

- Section 94-3701. Pawnbroker—doing business without license.
 94-3702. Failure to keep register.
 94-3703. Rate of interest.
 94-3704. Failure to produce register for inspection.

94-3701. (11184) Pawnbroker—doing business without license. Every person who carries on the business of a pawnbroker by receiving goods in pledge for loans at any rate of interest above the rate of ten per cent. per annum, except by authority of a license, is guilty of a misdemeanor.

History: En. Sec. 620, Pen. C. 1895;
 re-en. Sec. 620, Ch. 54, L. 1903; re-en.
 Sec. 8437, Rev. C. 1907; re-en. Sec. 11184,
 R. C. M. 1921. Cal. Pen. C. Sec. 338.

Pawnbrokers and Money Lenders 11.
 48 C.J. Pawnbrokers § 57.

40 Am. Jur. 691, Pawnbrokers and
 Moneylenders, § 3 et seq.

Cross-Reference

Pawnbroker's license, secs. 66-1601, 84-
 3201.

Failure to procure occupational or busi-
 ness license or permit as affecting validity
 or enforceability of contract. 30 ALR
 834, 876.

94-3702. (11185) Failure to keep register. Every person who carries on the business of a pawnbroker, dealer in second-hand goods, or junk dealer who fails at the time of the transaction to enter in a register kept by him for that purpose, in the English language, the date, duration, amount, and rate of interest of every loan made by him, or an accurate description of the property pledged or sold to him or by him, or the name and residence of the pledger or seller or purchaser, or to deliver to the pledger or seller or purchaser a written copy of such entry, or to keep an account in writing of all sales or purchases made by him, and every pawnbroker, dealer in second-hand goods, or junk dealer who receives goods in pledge or by gift, or purchases the same from any person under the age of twenty-one years, or from anybody acting as agent for said person, shall be deemed guilty of a misdemeanor, and a conviction thereof shall also work a forfeiture of his license.

History: En. Sec. 621, Pen. C. 1895; 8438, Rev. C. 1907; re-en. Sec. 11185, R.
 re-en. Sec. 621, Ch. 54, L. 1903; re-en. Sec. C. M. 1921. Cal. Pen. C. Sec. 339.

94-3703. (11186) Rate of interest. Every pawnbroker who charges or receives interest at the rate of more than three per cent. per month, or who, by charging commission, discount, storage, or other charge, or by compounding, increases or attempts to increase such interest, is guilty of a misdemeanor.

History: En. Sec. 622, Pen. C. 1895; 8439, Rev. C. 1907; re-en. Sec. 11186, R.
 re-en. Sec. 622, Ch. 54, L. 1903; re-en. Sec. C. M. 1921. Cal. Pen. C. Sec. 340.

Cross-Reference

Pawnbrokers, interest, sec. 66-1601.

94-3704. (11187) Failure to produce register for inspection. Every pawnbroker, dealer in second-hand goods, or junk dealer who fails, refuses, or neglects to produce for inspection his register, or to exhibit the articles received by him in pledge, or sold to him, or his account of sales and purchases, to any officer holding a warrant authorizing him to search for personal property, or the order of a committing magistrate directing such officer to inspect such register or examine such articles or accounts of sales or purchases, is guilty of a misdemeanor.

History: En. Sec. 623, Pen. C. 1895; 8440, Rev. C. 1907; re-en. Sec. 11187, R. amd. Sec. 623, Ch. 54, L. 1903; re-en. Sec. C. M. 1921. Cal. Pen. C. Sec. 343.

CHAPTER 38**PERJURY—SUBORNATION OF PERJURY**

- Section 94-3801. Perjury defined.
 94-3802. Oath defined.
 94-3803. Oath of office.
 94-3804. Witnesses before legislative assembly.
 94-3805. Penalty for testifying falsely.
 94-3806. Irregularity in administering oath.
 94-3807. Incompetency of witness no defense.
 94-3808. Knowledge of materiality of testimony not necessary.
 94-3809. Making depositions, etc., when deemed complete.
 94-3810. Statement of that which one does not know to be true.
 94-3811. Punishment of perjury.
 94-3812. Subornation of perjury.
 94-3813. Procuring the execution of innocent person.

94-3801. (10878) Perjury defined. Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury.

History: Earlier acts were Sec. 89, p. 198, Bannack Stat.; re-en. Sec. 101, p. 292, Cod. Stat. 1871; re-en. Sec. 101, 4th Div. Rev. Stat. 1879; re-en. Sec. 109, 4th Div. Comp. Stat. 1887.

This section en. Sec. 240, Pen. C. 1895; re-en. Sec. 8234, Rev. C. 1907; re-en. Sec. 10878, R. C. M. 1921. Cal. Pen. C. Sec. 118.

Cross-References

Absent voters' law, false oaths, sec. 23-1318.

Corrupt practices act, penalty, sec. 94-1474.

Driver's license act, false affidavit, sec. 31-154.

False oath by officer, penalty, sec. 25-222.

False swearing before election judge, sec. 75-1619.

Indictment, sec. 94-6801.

Pleading in information, sec. 94-6419.

Must Relate to a Material Matter

Under this section, the giving of false testimony does not constitute perjury unless the alleged false testimony related to a material matter. *State v. Hall*, 88 M 297; 303, 292 P 734.

Id. Under a charge of perjury based on alleged false testimony given by defendant in a murder trial as to when on the day after the homicide he arrived in the town where the crime had been committed, held, that, conceding that anything so connected with the matter at issue as to have a legitimate tendency to prove or disprove some material issue by giving weight or probability to, or detracting from, the testimony of a witness is material, and that if testimony is circumstantially material it is sufficient to sustain a perjury charge, the testimony in question was wholly immaterial to the homicide case and therefore conviction of defendant was not supported by the evidence.

Id. The fact that testimony conflicts with that of another witness who testified to a material matter does not make the evidence material within the meaning of this section, when otherwise immaterial.

Operation and Effect

Held, that a recital in an affidavit for a search warrant, "I personally saw a keg of intoxicating beverages in said barn," without disclosing the means employed by affiant for ascertaining the contents of the keg, was a statement of fact for the making of which, if untrue, a charge of perjury could be lodged against him, and therefore sufficient, if believed by the magistrate, to show probable cause for the issuance of the warrant. (Mr. Justice Galen dissenting.) *State ex rel. Baracker v. District Court*, 75 M 476, 479, 244 P 280.

Sufficiency of Evidence

Where the testimony of an attorney, charged with perjury, that at the time he gave certain testimony he did not know the statement made was false but firmly believed it to be true, giving plausible reasons for the statement, the finding of the referee, in view of the favorable position occupied by him in seeing the witness and hearing him testify, that the charge was not supported by the evidence, cannot be said on review to have been erroneous. *In re McCue*, 80 M 537, 552, 261 P 341.

Sufficiency of Information

An information charging perjury as having been committed in swearing at a criminal trial that a certain event happened at 11 o'clock, without stating whether it

was in the morning or at night, held not insufficient, where any person of ordinary intelligence could not, from a reading of other portions of the pleading, have arrived at any other conclusion than that it meant 11 o'clock in the forenoon; nor was it rendered insufficient by the ungrammatical use of the word "knowing" where "knowingly" should have been employed. *State v. Jackson*, 88 M 420, 430 et seq., 293 P 309.

Id. If an information for perjury sets forth the substance of the matter in respect to which the offense was committed, in what court and before whom the oath alleged to have been false was taken, and that the court or the person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which perjury is assigned, it is sufficient.

Perjury⊖1.

48 C.J. Perjury § 2.

See generally, 41 Am. Jur. 1, Perjury.

False statement made under fear or compulsion as perjury. 4 ALR 1319.

Offense of perjury as affected by question relating to jurisdiction of court before which testimony was given. 82 ALR 1127.

Effect of or attempt to make correction of false testimony. 99 ALR 890.

Perjury as predicated upon statements upon application for marriage license. 101 ALR 1263.

Oath taken in pursuance of administrative requirement as predicate for criminal offense of perjury. 108 ALR 1240.

Actionability of conspiracy to give, or to procure the giving of, false testimony. 139 ALR 469.

94-3802. (10879) Oath defined. The term "oath," as used in the last section, includes an affirmation and every mode authorized by law of attesting the truth of that which is stated.

History: En. Sec. 241, Pen. C. 1895; re-en. Sec. 8235, Rev. C. 1907; re-en. Sec. 10879, R. C. M. 1921. Cal. Pen. C. Sec. 119.

Perjury⊖10.

48 C.J. Perjury § 5.

94-3803. (10880) Oath of office. So much of an oath of office as relates to the future performance of official duties is not such an oath as is intended by the two preceding sections.

History: En. Sec. 242, Pen. C. 1895; re-en. Sec. 8236, Rev. C. 1907; re-en. Sec. 10880, R. C. M. 1921. Cal. Pen. C. Sec. 120.

Perjury⊖8.

48 C.J. Perjury § 54 et seq.

94-3804. (10881) Witnesses before legislative assembly. Every person appearing before a committee of either house of the legislature for the purpose of testifying before, or giving or furnishing information to, such committee, with reference to any matter then pending before such committee,

shall, upon the request of such committee, take an oath or affirmation, which such oath or affirmation shall be administered by the chairman, or acting chairman of such committee, and shall be in the following form: "You do solemnly swear (or affirm, as the case may be) that the evidence you shall give in the matter now pending before this committee, shall be the truth, the whole truth, and nothing but the truth, so help you God."

History: En. Sec. 1, Ch. 7, L. 1917; States³⁴.
re-en. Sec. 10881, R. C. M. 1921. 59 C.J. States § 74 et seq.

94-3805. (10882) Penalty for testifying falsely. Every person who, having taken the oath or affirmation required by the preceding section, knowingly or wilfully, and contrary to such oath or affirmation, states as true any material matter which he knows to be false, is guilty of perjury.

History: En. Sec. 2, Ch. 7, L. 1917; Perjury as predicated upon statements
re-en. Sec. 10882, R. C. M. 1921. upon application for marriage license. 101 ALR 1263.

Perjury⁵.

48 C.J. Perjury § 9.

See generally, 41 Am. Jur. 1, Perjury.

False statement made under fear or compulsion as perjury. 4 ALR 1319.

Effect of or attempt to make correction of false testimony. 99 ALR 890.

94-3806. (10883) Irregularity in administering oath. It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner.

History: En. Sec. 243, Pen. C. 1895; Perjury¹⁰.
re-en. Sec. 8237, Rev. C. 1907; re-en. Sec. 48 C.J. Perjury § 95 et seq.
10883, R. C. M. 1921. Cal. Pen. C. Sec. 121.

94-3807. (10884) Incompetency of witness no defense. It is no defense to a prosecution for perjury that the accused was not competent to give the testimony, deposition, or certificate of which falsehood is alleged. It is sufficient that he did give such testimony or make such deposition or certificate.

History: En. Sec. 244, Pen. C. 1895; Perjury¹¹ (10).
re-en. Sec. 8238, Rev. C. 1907; re-en. Sec. 48 C.J. Perjury § 32 et seq.
10884, R. C. M. 1921. Cal. Pen. C. Sec. 122.

94-3808. (10885) Knowledge of materiality of testimony not necessary. It is no defense to a prosecution for perjury that the accused did not know the materiality of the false statement made by him; or that it did not, in fact, affect the proceeding in or for which it was made. It is sufficient that it was material, and might have been used to affect such proceeding.

History: En. Sec. 245, Pen. C. 1895; Perjury¹¹ (2).
re-en. Sec. 8239, Rev. C. 1907; re-en. Sec. 48 C.J. Perjury § 33.
10885, R. C. M. 1921. Cal. Pen. C. Sec. 123.

94-3809. (10886) Making depositions, etc., when deemed complete. The making of a deposition or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true.

History: En. Sec. 246, Pen. C. 1895; 10886, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8240, Rev. C. 1907; re-en. Sec. 124.

PerjuryⒸ10.

48 C.J. Perjury § 77 et seq.

94-3810. (10887) Statement of that which one does not know to be true.

An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false.

History: En. Sec. 247, Pen. C. 1895; re-en. Sec. 8241, Rev. C. 1907; re-en. Sec. 10887, R. C. M. 1921. Cal. Pen. C. Sec. 125.

Operation and Effect

Perjury consisting not merely of swearing to some material statement which is not true, but in willfully, intentionally and corruptly falsifying under oath, an instruction (given after one embodying the words of this section, that an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false), that the issue in such a prosecution is whether defendant knowingly or willfully made a false answer, and that if the answer was in fact untrue but was made in good faith and in the belief of its truth, conviction could not follow, held not in conflict with, but supplementing, the one preceding it. *State v. Jackson*, 88 M 420, 431 et seq., 293 P 309.

Id. Held, that where the trial court in a prosecution for perjury had instructed the court in the words of this section, stating the abstract proposition that an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false, and at the request of defendant followed it with one explaining it, its action in thereafter withdrawing the latter under the circumstances set forth in this case was error.

References

Cited or applied as section 8241, Revised Codes, in *Smith v. Collis*, 42 M 350, 362, 112 P 1070; In re *McCue*, 80 M 537, 573, 261 P 341.

PerjuryⒸ12.

48 C.J. Perjury § 19 et seq.

94-3811. (10888) Punishment of perjury. Perjury is punishable by imprisonment in the state prison not less than one nor more than fourteen years.

History: En. Sec. 248, Pen. C. 1895; re-en. Sec. 8242, Rev. C. 1907; re-en. Sec. 10888, R. C. M. 1921. Cal. Pen. C. Sec. 126.

PerjuryⒸ41.

48 C.J. Perjury § 188.

94-3812. (10889) Subornation of perjury. Every person who wilfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured.

History: En. Sec. 249, Pen. C. 1895; re-en. Sec. 8243, Rev. C. 1907; re-en. Sec. 10889, R. C. M. 1921. Cal. Pen. C. Sec. 127.

PerjuryⒸ13.

48 C.J. Perjury § 189 et seq.

41 Am. Jur. 40, Perjury, §§ 74 et seq.

Actionability of conspiracy to give, or to procure the giving of, false testimony. 139 ALR 469.

94-3813. (10890) Procuring the execution of innocent person. Every person who, by wilful perjury, or subornation of perjury, procures the conviction and execution of any innocent person, is punishable by death.

History: En. Sec. 90, p. 198, Bannack Stat.; amd. Sec. 102, p. 292, Cod. Stat. 1871; re-en. Sec. 102, 4th Div. Rev. Stat. 1879; re-en. Sec. 110, 4th Div. Comp. Stat.

1887; amd. Sec. 250, Pen. C. 1895; re-en. Sec. 8244, Rev. C. 1907; re-en. Sec. 10890, R. C. M. 1921. Cal. Pen. C. Sec. 128.

CHAPTER 39

PUBLIC OFFICERS—OFFENSES BY

Section 94-3901. Acting in a public capacity without having qualified.
94-3902. Acts of officers de facto not affected.

- 94-3903. Giving or offering bribes to executive officers.
- 94-3904. Asking or receiving bribes.
- 94-3905. Resisting officers.
- 94-3906. Extortion.
- 94-3907. Officers illegally interested in contracts.
- 94-3908. Presenting fraudulent bills or claims for allowance or payment.
- 94-3909. Buying appointments to office.
- 94-3910. Taking rewards for deputation.
- 94-3911. Exercising functions of office wrongfully.
- 94-3912. Refusal to surrender books, etc., to successor.
- 94-3913. Preceding sections to apply to administrative and ministerial officers.
- 94-3914. False certificates by public officers.
- 94-3915. Officer refusing to receive or arrest parties charged with crime.
- 94-3916. Delaying to take person arrested before a magistrate.
- 94-3917. Inhumanity to prisoners.
- 94-3918. Confessions obtained by duress or inhuman practices.
- 94-3919. Violation of law a misdemeanor—penalty.
- 94-3920. Importing persons to discharge duties of peace officers prohibited.

94-3901. (10821) Acting in a public capacity without having qualified.

Every person who exercises any function of a public office without taking the oath of office, or without giving the required bond, is guilty of a misdemeanor.

History: En. Sec. 130, Pen. C. 1895; Officers ⇨ 121.
 re-en. Sec. 8176, Rev. C. 1907; re-en. Sec. 46 C.J. Officers § 346.
 10821, R. C. M. 1921. Cal. Pen. C. Sec. 65.

94-3902. (10822) Acts of officers de facto not affected. The last section does not affect the validity of acts done by a person exercising the functions of a public office in fact, where other persons than himself are interested in maintaining the validity of such acts.

History: En. Sec. 131, Pen. C. 1895; Officers ⇨ 104.
 re-en. Sec. 8177, Rev. C. 1907; re-en. Sec. 46 C.J. Officers § 378.
 10822, R. C. M. 1921. Cal. Pen. C. Sec. 66.

94-3903. (10823) Giving or offering bribes to executive officers. Every person who gives or offers any bribe to any executive officer of this state, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in the state prison not less than one nor more than ten years, and is disqualified from holding any office in this state.

History: En. Sec. 132, Pen. C. 1895; Criminal offense of bribery as affected by lack of legal qualification of person assuming to be an officer. 115 ALR 1263.
 re-en. Sec. 8178, Rev. C. 1907; re-en. Sec. 10823, R. C. M. 1921. Cal. Pen. C. Sec. 67.

References

Kelly v. Kipp et al., 77 M 110, 119, 250 P 819.

See generally, 8 Am. Jur. 885, Bribery.
 Predicating bribery or cognate offense upon unaccepted offer by or to an official. 52 ALR 816.

Officer's lack of authority as affecting offense of bribery. 122 ALR 951.

Bribery as affected by nonexistence of duty upon part of official to do, or refrain from doing, the act in respect of which it was sought to influence him. 158 ALR 323.

94-3904. (10824) Asking or receiving bribes. Every executive officer or person elected or appointed to an executive office, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the state prison not less than one nor more

than fourteen years; and, in addition thereto, forfeits his office, and is forever disqualified from holding any office in this state.

History: En. Sec. 133, Pen. C. 1895; re-en. Sec. 8179, Rev. C. 1907; re-en. Sec. 10824, R. C. M. 1921. Cal. Pen. C. Sec. 68.

Operation and Effect

To charge an officer (a sheriff) with bribery under this section, the accusation must allege that defendant had asked, received or agreed to receive the bribe upon an understanding that his official action should be influenced thereby; hence a charge that the briber gave the officer money with intent to influence the latter's official action, while sufficient to charge bribery against the giver, was insufficient to charge the offense against the accused, and therefore insufficient to charge him with willful or corrupt malfeasance in office. *State ex rel. Beazley v. District Court*, 75 M 116, 119, 120, 241 P 1075.

References

State v. Beazley, 77 M 430, 441, 250 P 1114; *State ex rel. State Highway Commission v. District Court*, 107 M 126, 133, 81 P 2d 347.

Bribery⌚1 (1); Officers⌚27, 64.

11 C.J.S. Bribery §§ 1, 2.

See generally, 8 Am. Jur. 885, Bribery.

Predicating bribery or cognate offense upon unaccepted offer by or to an official. 52 ALR 816.

Criminal offense of bribery as affected by lack of legal qualification of person assuming to be an officer. 115 ALR 1263.

Officer's lack of authority as affecting offense of bribery. 122 ALR 951.

Bribery as affected by nonexistence of duty upon part of official to do, or refrain from doing, the act in respect of which it was sought to influence him. 158 ALR 323.

94-3905. (10825) Resisting officers. Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer in the performance of his duty, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years.

History: En. Sec. 134, Pen. C. 1895; re-en. Sec. 8180, Rev. C. 1907; re-en. Sec. 10825, R. C. M. 1921. Cal. Pen. C. Sec. 69.

References

Cited or applied as section 8180, Revised Codes, in *State ex rel. Quintin v. Edwards*, 38 M 250, 266, 99 P 940.

Obstructing Justice⌚7.

46 C.J. Obstructing Justice § 17 et seq. 39 Am. Jur. 508, Obstructing Justice, §§ 12 et seq.

Dispute over custody as affecting charge of obstructing or resisting arrest. 3 ALR 1290.

What constitutes offense of obstructing or resisting officer. 48 ALR 746.

94-3906. (10826) Extortion. Every executive or ministerial officer who knowingly asks or receives any emolument, gratuity, or reward, or any promise thereof, except such as may be authorized by law, for doing any official act, is guilty of a misdemeanor.

History: En. Sec. 135, Pen. C. 1895; re-en. Sec. 8181, Rev. C. 1907; re-en. Sec. 10826, R. C. M. 1921. Cal. Pen. C. Sec. 70.

Extortion⌚1.

35 C.J.S. Extortion § 1.

22 Am. Jur. 235, Extortion and Black-mail, §§ 5 et seq.

94-3907. (10827) Officers illegally interested in contracts. Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars, or by imprisonment in the county jail or state prison not more than five years, and is forever disqualified from holding any office in this state.

History: En. Sec. 136, Pen. C. 1895; re-en. Sec. 8182, Rev. C. 1907; re-en. Sec. 10827, R. C. M. 1921. Cal. Pen. C. Sec. 71.

Operation and Effect

Evidence held to be insufficient to sustain a conviction in a prosecution for purchasing evidences of indebtedness against the county, contrary to this section. *State v. Danzer*, 35 M 269, 272, 88 P 952.

A police captain is an "officer," within the meaning of this section and section 59-504 making the purchase of a city warrant by city officers a crime punishable by disqualification from holding office, and the fact that the accused bought the warrant for a brother officer is unavailing as a defense. *State ex rel. O'Brien v. Mayor of Butte*, 54 M 533, 537, 172 P 134.

While this section provides severe punishment for a violation of the provisions of code sections (sections 59-501 to 59-503) prohibiting city officials from entering into contracts of sale of goods to the city in which they are interested, their guilt may not be presumed in advance of a fair trial, and contracts made in violation of said sections are not absolutely void but only voidable by parties other

than by the officer unlawfully entering into them, particularly where this section prescribed a penalty for violation by the offending officer. *Grady v. City of Livingston et al.*, 115 M 47, 55, 61, 141 P 2d 346.

References

Cited or applied as section 136, Penal Code, in *State v. Newman*, 34 M 434, 441, 87 P 462; *State ex rel. Anderson v. Fousek*, 91 M 448, 453, 8 P 2d 791.

Officers⇒121.

46 C.J. Officers § 346.

43 Am. Jur. 128, Public Officers, § 328.

Relation as creditor of contracting party as constituting interest within statute against public officer being interested in public contract. 73 ALR 1352.

Relationship as disqualifying interest within statute making it unlawful for an officer to be interested in a public contract. 74 ALR 792.

94-3908. (10828) Presenting fraudulent bills or claims for allowance or payment. Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer, or to any county, town, city, ward, or board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is guilty of felony.

History: En. Sec. 137, Pen. C. 1895; re-en. Sec. 8183, Rev. C. 1907; re-en. Sec. 10828, R. C. M. 1921. Cal. Pen. C. Sec. 72.

Fraud⇒68.

2 C.J.S. Agency § 10; 37 C.J.S. Fraud § 154.

94-3909. (10829) Buying appointments to office. Every person who gives or offers any gratuity or reward, in consideration that he or any other person shall be appointed to any public office, or shall be permitted to exercise or discharge the duties thereof, is guilty of a misdemeanor.

History: En. Sec. 138, Pen. C. 1895; re-en. Sec. 8184, Rev. C. 1907; re-en. Sec. 10829, R. C. M. 1921. Cal. Pen. C. Sec. 73.

94-3910. (10830) Taking rewards for deputation. Every public officer who, for any gratuity or reward, appoints another person to a public office, or permits another person to exercise or discharge any of the duties of his office, is punishable by a fine not exceeding five thousand dollars, and, in addition thereto, forfeits his office, and is forever disqualified from holding any office in this state.

History: Ap. p. Sec. 114, p. 205, Banck Stat.; re-en. Sec. 127, p. 298, Cod. Stat. 1871; re-en. Sec. 127, 4th Div. Rev. Stat. 1879; re-en. Sec. 136, 4th Div. Comp.

Stat. 1887; amd. Sec. 139, Pen. C. 1895; re-en. Sec. 8185, Rev. C. 1907; re-en. Sec. 10830, R. C. M. 1921. Cal. Pen. C. Sec. 74.

94-3911. (10831) Exercising functions of office wrongfully. Every person who wilfully and knowingly intrudes himself into any public office to which he has not been elected or appointed, and every person who, having been an executive officer, wilfully exercises any of the functions of his office

after his term has expired, and a successor has been elected or appointed and has qualified, is guilty of a misdemeanor.

History: Ap. p. Sec. 110, p. 204, Bannack Stat.; re-en. Sec. 124, p. 298, Cod. Stat. 1871; re-en. Sec. 124, 4th Div. Rev. Stat. 1879; re-en. Sec. 133, 4th Div. Comp. Stat. 1887; amd. Sec. 140, Pen. C. 1895; re-en. Sec. 8186, Rev. C. 1907; re-en. Sec. 10831, R. C. M. 1921. Cal. Pen. C. Sec. 75. Officers[Ⓒ]121. 46 C.J. Officers § 346 et seq.

94-3912. (10832) Refusal to surrender books, etc., to successor. Every officer whose office is abolished by law, or who, after the expiration of the time for which he may be appointed or elected, or after he has resigned or been legally removed from office, wilfully and unlawfully withholds or detains from his successor, or other person entitled thereto, the records, papers, documents, or other writings appertaining or belonging to his office, or wrongfully refuses to surrender the official seal, or mutilates, destroys, or takes away the same, is guilty of a misdemeanor, and is punishable by a fine not exceeding two thousand dollars, or by imprisonment not exceeding one year, or both.

History: Ap. p. Sec. 96, p. 200, Bannack Stat.; re-en. Sec. 108, p. 294, Cod. Stat. 1871; re-en. Sec. 108, 4th Div. Rev. Stat. 1879; re-en. Sec. 116, 4th Div. Comp. Stat. 1887; amd. Sec. 141, Pen. C. 1895; re-en. Sec. 8187, Rev. C. 1907; re-en. Sec. 10832, R. C. M. 1921. Cal. Pen. C. Sec. 76.

94-3913. (10833) Preceding sections to apply to administrative and ministerial officers. The various provisions of this chapter apply to administrative and ministerial officers, in the same manner as if they were mentioned therein.

History: En. Sec. 142, Pen. C. 1895; re-en. Sec. 8188, Rev. C. 1907; re-en. Sec. 10833, R. C. M. 1921. Cal. Pen. C. Sec. 77.

94-3914. (10945) False certificates by public officers. Every public officer or board authorized by law to make or give any certificate or other writing, who makes and delivers as true any such certificate or writing, containing statements which he knows to be false, is guilty of a misdemeanor.

History: En. Sec. 294, Pen. C. 1895; re-en. Sec. 8276, Rev. C. 1907; re-en. Sec. 10945, R. C. M. 1921. Cal. Pen. C. Sec. 167.

References

Cited or applied as section 294, Penal Code, in In re Terrett, 34 M 325, 335, 86 P 266.

Officers[Ⓒ]121.

46 C.J. Officers § 346 et seq.

94-3915. (10916) Officer refusing to receive or arrest parties charged with crime. Every sheriff, coroner, keeper of a jail, constable, or other peace officer, who wilfully refuses to receive or arrest any person charged with a criminal offense, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years.

History: En. Sec. 107, p. 203, Bannack Stat.; re-en. Sec. 119, p. 296, Cod. Stat. 1871; re-en. Sec. 119, 4th Div. Rev. Stat. 1879; re-en. Sec. 128, 4th Div. Comp. Stat. 1887; amd. Sec. 270, Pen. C. 1895; re-en. Sec. 8252, Rev. C. 1907; re-en. Sec. 10916, R. C. M. 1921. Cal. Pen. C. Sec. 142.

Coroners[Ⓒ]25; Officers[Ⓒ]121; Sheriffs and Constables[Ⓒ]153.

18 C.J.S. Coroners § 31; 46 C.J. Officers § 346; 57 C.J. Sheriffs and Constables § 1112.

94-3916. (10920) Delaying to take person arrested before a magistrate.

Every public officer or other person, having arrested any person upon a criminal charge, who wilfully delays to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemeanor.

History: En. Sec. 274, Pen. C. 1895; re-en. Sec. 8256, Rev. C. 1907; re-en. Sec. 10920, R. C. M. 1921. Cal. Pen. C. Sec. 145.

References

Plummer v. Northern Pac. Ry. Co., 79 M 82, 87, 255 P 18.

Arrest—70.

6 C.J.S. Arrest § 17.

94-3917. (10922) Inhumanity to prisoners. Every officer who is found guilty of wilful inhumanity or oppression toward any prisoner under his care or in his custody, is punishable by fine not exceeding two thousand dollars, and by removal from office.

History: En. Sec. 95, p. 200, Bannack Stat.; amd. Sec. 107, p. 294, Cod. Stat. 1871; re-en. Sec. 107, 4th Div. Rev. Stat. 1879; re-en. Sec. 115, 4th Div. Comp. Stat. 1887; amd. Sec. 276, Pen. C. 1895; re-en. Sec. 8258, Rev. C. 1907; re-en. Sec. 10922, R. C. M. 1921. Cal. Pen. C. Sec. 147.

Liability for medical or surgical services to prisoners. 44 ALR 1285.

Liability for death of or injury to prisoner. 46 ALR 94.

Constitutionality of statutes in relation to treatment or discipline of convicts. 50 ALR 104.

Civil liability of peace officers for negligence causing death of or injury to prisoner. 61 ALR 571.

Mistreatment of prisoner as ground for removal of sheriff or other police officer. 100 ALR 1401.

Officers—66, 121; Sheriffs and Constables—13, 153.

46 C.J. Officers §§ 147 et seq., 346; 57 C.J. Sheriffs and Constables §§ 80 et seq., 1112.

41 Am. Jur. 891, Prisons and Prisoners, §§ 9 et seq.

94-3918. (10923) Confessions obtained by duress or inhuman practices.

It shall be unlawful for any sheriff, constable, police officer, or any persons charged with the custody of any one accused of crime, of whatever nature, or with the violation of a municipal ordinance, to frighten or attempt to frighten by threats, torture, or attempt to torture, or resort to any means of an inhuman nature, or practice what is commonly known as the "third degree" in order to secure a confession from such person.

History: En. Sec. 1, Ch. 89, L. 1911; re-en. Sec. 10923, R. C. M. 1921.

Where Written Confession Used for Impeachment

Where one of two defendants charged with grand larceny gave the county attorney a written statement which was used on cross-examination for purposes of im-

peachment, upon contention that a proper foundation had not been laid for its admission in evidence, held, that the statement not having been used as a confession, but for purpose of impeachment, the state was not required to show that it had been voluntarily made. *State v. Fisher*, 108 M 68, 72, 88 P 2d 53.

94-3919. (10924) Violation of law a misdemeanor—penalty. A violation of the provisions of the preceding section shall constitute a misdemeanor, and shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 89, L. 1911; re-en. Sec. 10924, R. C. M. 1921.

94-3920. (10925) Importing persons to discharge duties of peace officers prohibited. It shall be unlawful for any person or persons, company, asso-

ciation, or corporation to bring or import into this state, or to in anywise aid in bringing or importing into this state, any person or persons, or association of persons, for the purpose of discharging the duties devolving upon sheriffs, deputy sheriffs, marshals, policemen, or constables or peace officers in the protection or preservation of public or private property, or in the punishment of any person violating the criminal laws of this state.

History: En. Sec. 4599, Pol. C. 1895; Obstructing Justice⊖7.
 re-en. Sec. 3125, Rev. C. 1907; re-en. Sec. 46 C.J. Obstructing Justice § 31.
 10925, R. C. M. 1921.

CHAPTER 40

POOL HALLS—BILLIARD HALLS—BOWLING ALLEYS— PROHIBITIONS GOVERNING

Section 94-4001. Conducting certain pool games a misdemeanor.
 94-4002. Same—playing games—punishment for.
 94-4003. Closing hour for pool halls, billiard halls and bowling alleys.
 94-4004. Penalty for permitting minors in pool or billiard hall.
 94-4005. Penalty for violation of act.

94-4001. (11188) Conducting certain pool games a misdemeanor. Any owner, proprietor, manager, or employee who permits, or any person who carries on, or conducts, or causes to be conducted or runs, as principal, agent, or employee, any game of pea pool, pay pool, Kelly pool, or any other game of chance, science, or skill, played upon any pooltable or upon any billiard-table, for money, checks, credits, or any representative of value, shall be deemed to be guilty of a misdemeanor and punished as provided in this act.

History: En. Sec. 1, Ch. 29, L. 1917; Gaming⊖74 (5).
 re-en. Sec. 11188, R. C. M. 1921. 38 C.J.S. Gaming §§ 1, 96, 98.

94-4002. (11189) Same—playing games—punishment for. Any person who shall participate as a player in the games prohibited by this act shall be deemed guilty of a violation thereof and punished as provided in this act.

History: En. Sec. 2, Ch. 29, L. 1917; Gaming⊖79 (1).
 re-en. Sec. 11189, R. C. M. 1921. 38 C.J.S. Gaming §§ 83, 99, 101.

94-4003. (11190) Closing hour for pool halls, billiard halls and bowling alleys. All pool halls, billiard halls, bowling alleys, and other places of business where pool or billiards is played, shall be closed each night in the year at an hour not later than twelve o'clock, midnight, and shall be kept closed until seven o'clock the following morning; provided, however, that the provisions of this act shall not extend the hours of keeping open such resorts and places of business which by regulation of law or ordinance are required to be closed at an earlier hour than twelve o'clock, midnight.

History: En. Sec. 3, Ch. 29, L. 1917; Theaters and Shows⊖2.
 re-en. Sec. 11190, R. C. M. 1921. 62 C.J. Theaters and Shows § 93.

94-4004. (11191) Penalty for permitting minors in pool or billiard hall. Every owner, proprietor, manager, or employee of a pool or billiard hall who permits a minor under the age of eighteen years to play, resort, or stop therein, is guilty of a misdemeanor.

History: En. Sec. 4, Ch. 29, L. 1917; Theaters and Shows⊖9.
 amd. Sec. 1, Ch. 115, L. 1921; re-en. Sec. 11191, R. C. M. 1921. 62 C.J. Theaters and Shows § 93.

94-4005. (11192) Penalty for violation of act. Any person who shall violate any of the provisions of this act shall be punished by a fine of not less than fifty dollars nor more than three hundred dollars, or by imprisonment of not more than six months, or by both such fine and imprisonment.

History: En. Sec. 5, Ch. 29, L. 1917;
re-en. Sec. 11192, R. C. M. 1921.

CHAPTER 41

RAPE AND OTHER SEXUAL CRIMES

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| Section | 94-4101. Rape defined. | Tit. 94, c. 41
Rel. matter
L. '51, c. 68
Sec. 1, p. 119 |
| | 94-4102. When physical ability must be proved. | |
| | 94-4103. Penetration sufficient. | |
| | 94-4104. Punishment of rape. | |
| | 94-4105. Abduction of women. | |
| | 94-4106. Lewd and lascivious acts upon children. | |
| | 94-4107. Open and notorious adultery and fornication. | |
| | 94-4108. Seduction—penalty. | |
| | 94-4109. Importation and exportation of females for immoral purposes. | |
| | 94-4110. Procuring women to reside in houses of prostitution or for immoral purposes a felony. | |
| | 94-4111. Same—procuring women for concubinage and other immoral purposes a felony. | |
| | 94-4112. Receiving money for causing immoral acts of women a felony. | |
| | 94-4113. Paying money for procuring women for immoral purposes a felony. | |
| | 94-4114. Receiving money for procuring women for immoral purposes a felony. | |
| | 94-4115. Unlawful restraint of women in houses of prostitution and elsewhere a felony. | |
| | 94-4116. Accepting money from earnings of prostitute a felony. | |
| | 94-4117. Living with a common prostitute a felony. | |
| | 94-4118. Crime against nature. | |
| | 94-4119. Penetration sufficient to complete the crime. | |

94-4101. (11000) Rape defined. Rape is an act of sexual intercourse, accomplished with a female, not the wife of the perpetrator, under any of the following circumstances:

1. When the female is under the age of eighteen years.
2. Where she is incapable, through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent.
3. Where she resists, but her resistance is overcome by violence or force.
4. Where she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution, or by any intoxicating narcotic, or other anesthetic substance, administered by or with the privity of the accused.
5. Where she is, at the time, unconscious of the nature of the act, and this is known to the accused.
6. Where she submits, under a belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with the intent to induce such belief.

History: Ap. p. Sec. 43, p. 184, Ban-
nack Stat.; re-en. Sec. 46, p. 277, Cod.
Stat. 1871; re-en. Sec. 46, 4th Div. Rev.
Stat. 1879; re-en. Sec. 46, 4th Div. Comp.
Stat. 1887; amd. Sec. 450, Pen. C. 1895;
re-en. Sec. 8336, Rev. C. 1907; amd. Sec.
1, Ch. 16, L. 1913; re-en. Sec. 11000, R.
C. M. 1921. Cal. Pen. C. Sec. 261.

Civil Action for Alleged Assault to Com- mit Rape

In an action for damages for attempted rape the testimony of plaintiff should be

considered in the light of all the attendant circumstances, as should also the question whether her subsequent conduct was the usual and natural conduct of an outraged woman as bearing upon the credibility of her direct testimony, such charges being easily made, often inspired by malice, hidden motives or revenge, and hard to disprove. Evidence in instant case held to have made for improbability of the occurrence, and insufficient, warranting reversal with directions to dismiss the action. *Cullen v. Peschel*, 115 M 187, 191, 142 P 2d 559.

Effect of Age of Prosecutrix on Evidence Admitted

In a prosecution for rape under subdivision 1 of this section, (an act of sexual intercourse accomplished with a female under the age of eighteen years), it is immaterial that she consented to the act, that defendant was ignorant of her age or that she misrepresented her age to him, or that she was lacking in chastity, or at the time was an inmate of a house of prostitution, nonage on her part being sufficient to warrant conviction. *State v. Duncan*, 82 M 170, 184, 266 P 400.

Sufficiency of Evidence

Where an information in a rape case charges defendant with carnal knowledge of a female under the statutory age of consent, violently, and against her will, and there is ample evidence that the female was under that age, it is not incumbent on the state to also prove that she resisted defendant's assault, and that he violently overcame her resistance, even though it has been so alleged. *State v. Mahoney*, 24 M 281, 285, 61 P 647.

Evidence held insufficient to justify a conviction for rape charged to have been accomplished by violence and force, but rather to show that the prosecuting witness failed to offer any physical resistance which it required force to overcome, within the meaning of subdivision 3 of this section. *State v. Needy*, 43 M 442, 444, 117 P 102.

To warrant conviction for an attempt to commit rape by force, the evidence must be sufficient to establish beyond a reasonable doubt that the defendant assaulted the prosecutrix with the intention to accomplish his purpose at all events and notwithstanding any resistance on her part; hence if intent in the mind of the assailant to overcome by force all resistance which might be offered is absent, defendant is entitled to an acquittal. *State v. Hennessy*, 73 M 20, 22, 234 P 1094.

Id. Evidence adduced in a prosecution for an attempted rape by force reviewed and held insufficient to sustain a verdict of guilty, it presenting a case of urgent

solicitation rather than of an intention by the use of force to overcome the resistance of the prosecutrix.

Id. Proof of indecency, immorality and grossly offensive and reprehensible conduct on the part of the defendant sufficient to constitute simple assault is alone insufficient to establish an attempt to commit rape by force.

An information charging rape accomplished by violence and force, and against the will and consent of the prosecuting witness, is sufficient and warrants proof either of resistance overcome by violence or superior force, or of threats of a nature to excuse nonresistance. *State v. Whitmore*, 94 M 119, 121, 21 P 2d 58.

Sufficiency of Indictment or Information

In an indictment for rape, it is not necessary to allege that the female injured is not the wife of the defendant. *State v. Williams*, 9 M 179, 180, 23 P 335; *State v. Morrison*, 46 M 84, 88, 125 P 649.

An information for rape, alleging that the act was committed by force and against the will and consent of the female, is sufficient, under subdivisions 3 and 4 of this section, and authorizes proof that the act was committed under the circumstances provided for in either subdivision. *State v. Morrison*, 46 M 84, 88, 125 P 649.

Held, that there was no variance between an information charging the commission of rape by violence and force, and the evidence of the prosecutrix that she was rendered helpless by a blow in the face which stunned her prior to the commission of the offense, even though she was unconscious or semi-conscious during its commission; such proof of her condition as a reason for nonresistance bringing the case within subdivision 3 of this section, i.e., rape, where the resistance of the female is overcome by violence or force. *State v. Whitmore*, 94 M 119, 121, 21 P 2d 58.

"Unconscious" Defined

The term "unconscious" as used in subdivision 5 of this section, defining the crime of rape, held not to have reference to the loss of physical or mental faculties on the part of the female through assault and violence; that subdivision having to do only with a situation where she is unconscious of the nature of the act. *State v. Whitmore*, 94 M 119, 121, 21 P 2d 58.

When Force Is Immaterial

The question of force is immaterial where the prosecuting witness is under the statutory age of consent. *State v. Bowser*, 21 M 133, 141, 53 P 179.

Where Prosecutrix Impeached by Officers, and Confession Corroborated by Circumstances

Where defendant in a prosecution for rape virtually enticed prosecutrix from her home and placed her in a house of unsavory reputation, kept her there for three or four days and did not disclose her whereabouts to her father who was searching for her, and in addition made a confession, these circumstances and others, despite the fact that prosecutrix of tender years repudiated a prior statement to officers that she had sexual intercourse with defendant, which the officers confirmed by impeaching testimony, held sufficient to prove the corpus delicti and sustain conviction. *State v. Traufer*, 109 M 275, 284, 97 P 2d 336.

References

State v. Richardson, 63 M 322, 332, 207 P 124; *State v. Russell*, 73 M 240, 235 P 712.

94-4102. (11001) When physical ability must be proved. No conviction for rape can be had against one who was under the age of sixteen years at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact, and beyond a reasonable doubt.

History: En. Sec. 48, 4th Div. Comp. re-en. Sec. 8337, Rev. C. 1907; re-en. Sec. Stat. 1887; re-en. Sec. 451, Pen. C. 1895; 11001, R. C. M. 1921. Cal. Pen. C. Sec. 262.

94-4103. (11002) Penetration sufficient. The essential guilt of rape consists in the outrage to the person and feelings of the female. Any sexual penetration, however slight, is sufficient to complete the crime.

History: En. Sec. 47, 4th Div. Comp. Stat. 1887; re-en. Sec. 452, Pen. C. 1895; re-en. Sec. 8338, Rev. C. 1907; re-en. Sec. 11002, R. C. M. 1921. Cal. Pen. C. Sec. 263.

94-4104. (11003) Punishment of rape. Rape is punishable by imprisonment in the state prison not less than two nor more than ninety-nine years.

History: En. Sec. 8339, Rev. C. 1907; amd. Sec. 1, Ch. 10, L. 1909; re-en. Sec. 11003, R. C. M. 1921. Cal. Pen. C. Sec. 264.

94-4105. (11004) Abduction of women. Every person who takes any woman unlawfully, against her will, and by force, menace, or duress compels her to marry him, or to marry any other person, or to be defiled, is punishable by imprisonment in the state prison not less than two nor more than fourteen years.

History: Ap. p. Sec. 52, p. 186, Ban-nack Stat.; re-en. Sec. 52, p. 278, Cod. Stat. 1871; re-en. Sec. 52, 4th Div. Rev. Stat. 1879; re-en. Sec. 55, 4th Div. Comp. Stat. 1887; amd. Sec. 454, Pen. C. 1895; re-en. Sec. 8340, Rev. C. 1907; re-en. Sec.

Rape 1, 6, 9-13.

52 C.J. Rape § 2 et seq.

See generally, 44 Am. Jur. 897, Rape.

Marriage subsequent to crime as bar to prosecution for rape. 9 ALR 339.

Intercourse under marriage with girl below the age of consent as statutory rape. 10 ALR 409.

Directing acquittal for insufficiency of the evidence. 17 ALR 910.

Criminal responsibility of husband as for rape on wife. 18 ALR 1063.

Impotency as defense to charge of rape or assault with intent to commit rape. 26 ALR 772.

Civil liability for carnal knowledge with actual consent of girl under age of consent. 45 ALR 780.

Corroboration of prosecutrix under age of consent. 60 ALR 1129.

Rape 7.

52 C.J. Rape § 24.

Rape 64.

52 C.J. Rape § 166.

11004, R. C. M. 1921. Cal. Pen. C. Sec. 265.

Abduction 1.

1 C.J.S. Abduction §§ 1-13, 15.

See generally, 1 Am. Jur. 125, Abduction.

Forcing another to transport one as constituting offense of kidnaping or of abduction. 62 ALR 200.

94-4106. (11005) Lewd and lascivious acts upon children. Any person over the age of eighteen (18) years, who shall wilfully and lewdly commit any lewd or lascivious act, other than the acts constituting other crimes provided in sections 94-4101 to 94-4108, upon or with the body or any part or member thereof, of a child under the age of sixteen (16) years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, or of such child, shall be guilty of a felony, and shall be imprisoned in the state prison not exceeding five (5) years.

History: En. Sec. 1, Ch. 59, L. 1913; re-en. Sec. 11005, R. C. M. 1921; amd. Sec. 1, Ch. 70, L. 1935.

Constitutionality

The legislature has the power to prohibit the commission of lewd and lascivious acts upon children under certain ages, and contention that this section, defining and prescribing punishment for such offense is unconstitutional, held not meritorious. *State v. Kocher*, 112 M 511, 518, 119 P 2d 35.

Elements of Crime

The elements of the crime prescribed by this section are, first, the offender must be over the age of 18 years, second, a lewd or lascivious act must have been committed upon or with the body, or any part or member thereof, of a child under the age of 16 years, the legislature by this provision evidently meaning a physi-

Belief in legality of the act as affecting offense of abduction or kidnaping. 114 ALR 870.

cal contact between the accused and the child (there need not be a "flesh to flesh" contact); and, third, the act must have been committed with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the accused or of the child. *State v. Kocher*, 112 M 511, 514, 119 P 2d 35.

Information Held Sufficient

Information stating that the defendant "did then and there wilfully, unlawfully, feloniously and lewdly place his hands upon the body and person of said (prosecutrix) and attempted to remove her dress, with the intent of then and there arousing, appealing to, and gratifying the lust, passion and sexual desires of said (prosecutrix) or of the defendant." *State v. Kocher*, 112 M 511, 514, 119 P 2d 35.

Infants ⇨ 20.

43 C.J.S. Infants § 22.

94-4107. (11006) Open and notorious adultery and fornication. Every person who lives in open and notorious cohabitation, in a state of adultery or fornication, is punishable by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or both. The intermarriage of the parties subsequent to the commission of the offense is a bar to the prosecution.

History: For earlier acts, see Sec. 127, p. 208, Bannack Stat.; Sec. 146, 4th Div. Rev. Stat. 1879; Sec. 161, 4th Div. Comp. Stat. 1887; en. Sec. 457, Pen. C. 1895; re-en. Sec. 8343, Rev. C. 1907; re-en. Sec. 11006, R. C. M. 1921. Cal. Pen. C. Sec. 269a.

Operation and Effect

Instance of a complaint, charging an offense under this section, having been filed as required by section 94-100-1. In re *Graye*, 36 M 394, 400, 93 P 266.

The offense of living together in open and notorious cohabitation, in a state of fornication, is a misdemeanor, and falls within the jurisdiction of a justice of the peace. *Hosoda v. Neville*, 45 M 310, 312, 123 P 20.

References

Cited or applied as section 457, Penal Code, in *Ledlie v. Wallen*, 17 M 150, 155, 42 P 289; *Kosonen v. Waara*, 87 M 24, 33, 285 P 668.

Lewdness ⇨ 1, 2.

36 C.J. Lewdness § 3 et seq.

See generally, 1 Am. Jur. 679, Adultery and Fornication.

Discontinuance by injured spouse of prosecution for adultery. 4 ALR 1340.

Single person who has carnal intercourse with married person of the opposite sex as guilty of aiding and abetting adultery. 5 ALR 783.

Veneral disease as evidence of adultery. 5 ALR 1020.

Liability as co-conspirator of one personally incapable of committing adultery who aids another to do so. 74 ALR 1114.

Isolated acts of sexual intercourse as constituting criminal offense of adultery or fornication or illicit cohabitation. 74 ALR 1361.

94-4108. (11007) Seduction—penalty. Every person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment in the state prison not more than five years, or by a fine not more than five thousand dollars, or both. The intermarriage of the parties subsequent to the commission of the offense is a bar to the prosecution.

History: En. Sec. 458, Pen. C. 1895; re-en. Sec. 8344, Rev. C. 1907; re-en. Sec. 11007, R. C. M. 1921. Cal. Pen. C. Sec. 268.

Seduction—29, 36.

57 C.J. Seduction §§ 153 et seq., 170.

27 Am. Jur. 39, Husband and Wife, §§ 435 et seq.; 47 Am. Jur. 627, Seduction, generally.

Subsequent intermarriage of parties, forgiveness, compromise, etc., as defense to prosecution for seduction. 80 ALR 833.

Facts preventing a valid marriage between prosecutrix and defendant as defense. 85 ALR 123.

Right of seduced female to maintain action for seduction. 121 ALR 1487.

Cross-Reference

Damages for seduction, sec. 17-407.

References

Taylor v. Rann, 106 M 588, 595, 80 P 2d 376.

94-4109. (11008) Importation and exportation of females for immoral purposes. The importation of women and girls into this state or the exportation of women and girls from this state for immoral purposes is hereby prohibited, and whoever shall induce, entice, or procure, or attempt to induce, entice, or procure to come in this state, or to go from this state, any woman or girl for the purpose of prostitution or concubinage, or for any other immoral purpose, or to enter any house of prostitution in this state, or any one who shall aid any such woman or girl in obtaining transportation to or within this state, for the purpose of prostitution or concubinage, or for any other immoral purpose, shall be deemed guilty of a felony and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 1, Ch. 1, L. 1911; re-en. Sec. 11008, R. C. M. 1921.

Constitutionality

So much of the foregoing section as related to transportation of women into this state from without the state was held unconstitutional in *State v. Harper*, 48 M 456, 138 P 495.

Held, that Chapter 1, Laws of 1911 (this section et seq.), known as the "White Slave Act," is not unconstitutional as violative of section 23, article V, of the constitution, which provides that the title of an act shall not embrace more than one subject. *State v. Pippi*, 59 M 116, 119 et seq., 195 P 556.

Operation and Effect

An attempt to induce a female to take up her residence in another state for im-

moral purposes, which was complete before transportation had commenced, was punishable under this act, and not under the federal statute. *State v. Reed*, 53 M 292, 297, 163 P 477.

Where, under an information charging defendant with a violation of the White Slavery Act, in aiding an unmarried woman to obtain transportation from one county to a point in another county, the evidence of the state disclosed no more than that the accused on a certain day conveyed the woman from one point to another in the same county after which they were not again seen together until some five months thereafter, when they were found in another state living together in a state of adultery, it was insufficient to warrant conviction under the information. *State v. Berndt*, 60 M 377, 378, 199 P 444.

References

Cited or applied as section 1, Chapter 1, Laws of 1911, in *State v. Harper*, 48 M 456, 458, 138 P 495.

Prosecution—1.

50 C.J. Prostitution § 3 et seq.

42 Am. Jur. 264, Prostitution, §§ 5 et seq.

Construction of statute as to transporting female for purpose of prostitution. 74 ALR 330.

Criminal responsibility of woman who connives or consents to her own transportation for immoral purposes. 84 ALR 376.

94-4110. (11009) Procuring women to reside in houses of prostitution or for immoral purposes a felony. Any person who shall place any female in the charge or custody of any other person for immoral purposes or in a house of prostitution or elsewhere with intent that she shall live a life of prostitution; or any person who shall compel or shall induce, entice, or procure, or attempt to induce, entice, procure or compel any female to reside with him or with any other person for immoral purposes, or for the purpose of prostitution, or shall compel any such female to reside in a house of prostitution, or compel or attempt to induce, entice, procure or compel her to live a life of prostitution, shall be guilty of a felony and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 1, L. 1911; re-en. Sec. 11009, R. C. M. 1921.

Cross-References

Admission of minor to house of prostitution, sec. 94-35-137.

Enticing to place of prostitution, sec. 94-3610.

Keeping disorderly house, penalty, secs. 94-3607, 94-3608, 94-3614.

Operation and Effect

An attempt to induce a female to take up her residence in another state for im-

moral purposes, which was complete before transportation had commenced, was punishable under the Donlan, and not under the Mann, act. *State v. Reed*, 53 M 292, 163 P 477.

See generally, 42 Am. Jur. 259, Prostitution.

Police officer's failure to suppress bawdy-house as punishable offense. 134 ALR 1258.

White Slave Traffic Act (Mann Act) as affecting constitutionality or application of state statutes dealing with prostitution. 161 ALR 356.

94-4111. (11010) Same—procuring women for concubinage and other immoral purposes a felony. Any person who shall induce, entice, or procure, or attempt to induce, entice or procure any woman or girl for the purpose of prostitution or concubinage, or for any other immoral purpose, or to enter any house of prostitution in this state, shall be deemed guilty of a felony and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 1, L. 1911; re-en. Sec. 11010, R. C. M. 1921.

Entrapment to commit crime of procuring women for immoral purposes, with view to prosecution therefor. 18 ALR 186.

94-4112. (11011) Receiving money for causing immoral acts of women a felony. Any person who shall receive any money or other valuable thing for or on account of placing in a house of prostitution or elsewhere any female for the purpose of causing her to cohabit with any male person or persons to whom she is not married shall be guilty of a felony and, upon

conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 4, Ch. 1, L. 1911;
re-en. Sec. 11011, R. C. M. 1921.

94-4113. (11012) Paying money for procuring women for immoral purposes a felony. Any person who shall pay any money or other valuable thing to procure any female for the purpose of placing her for immoral purposes in any house of prostitution or elsewhere, with or without her consent, shall be guilty of a felony, and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 5, Ch. 1, L. 1911;
re-en. Sec. 11012, R. C. M. 1921.

94-4114. (11013) Receiving money for procuring women for immoral purposes a felony. Any person who shall knowingly receive any money or other valuable thing for or on account of procuring and placing in the custody of another person for immoral purposes any woman, with or without her consent, shall be guilty of a felony and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 6, Ch. 1, L. 1911;
re-en. Sec. 11013, R. C. M. 1921.

94-4115. (11014) Unlawful restraint of women in houses of prostitution and elsewhere a felony. Any person who shall hold, detain, restrain, or attempt to hold, detain, or restrain in any house of prostitution or other place, any female for the purpose of compelling such female, directly or indirectly, by her voluntary or involuntary service or labor to pay, liquidate or cancel any debt, dues or obligations incurred in such house of prostitution, or in any other place, shall be deemed guilty of a felony and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 7, Ch. 1, L. 1911;
re-en. Sec. 11014, R. C. M. 1921.

94-4116. (11015) Accepting money from earnings of prostitute a felony. Any person who shall knowingly accept, receive, levy, or appropriate any money or other valuable thing without consideration, from the proceeds or earnings of any woman engaged in prostitution shall be deemed guilty of a felony and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than two years nor more than twenty years, or by fine of not less than one thousand dollars nor more than five thousand dollars, or by both such fine and imprisonment. Any

such acceptance, receipt, levy, or appropriation of such money or valuable thing shall, upon any proceeding or trial for violation of this section, be presumptive evidence of lack of consideration.

History: En. Sec. 8, Ch. 1, L. 1911; re-en. Sec. 11015, R. C. M. 1921.

Operation and Effect

Where defendant had given his note for money he obtained from a prostitute, he was not guilty of a violation of this section, prohibiting the accepting of money from such persons without consideration, even though he later refused to pay the note placed in a bank for collection. *State v. Jones*, 51 M 390, 393, 153 P 282.

Knowingly and without consideration taking or receiving from a prostitute any of her earnings is a separate and distinct offense, under this statute, from that of living upon her earnings. *State v. Kanakaris*, 54 M 180, 182, 169 P 42.

94-4117. (11016) Living with a common prostitute a felony. Any male person who shall live with, or in whole or in part upon, the earnings of, or money supplied by a common prostitute or woman of bad repute, shall be guilty of a felony, and, on conviction thereof, shall be punishable by imprisonment in the state prison for a period of not less than one year nor more than twenty years.

History: En. Sec. 9, Ch. 1, L. 1911; re-en. Sec. 11016, R. C. M. 1921.

Under this case, held that, the provision of this section making the acceptance of money from a prostitute presumptive evidence of lack of consideration is valid, and in enacting it the legislature did not transgress its power. *State v. Pippi*, 59 M 116, 119 et seq., 195 P 556.

References

State v. Berndt, 60 M 377, 378, 199 P 444.

Constitutionality of statute enacted to prevent prostitution, and providing that upon the trial of one accused of violating its provisions, the acceptance of money from the earnings of a prostitute shall be prima facie evidence of lack of consideration. 51 ALR 1156.

94-4118. (11030) Crime against nature. Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years.

History: Earlier acts were Sec. 44, p. 185, Bannack Stat.; re-en. Sec. 47, p. 277, Cod. Stat. 1871; re-en. Sec. 47, 4th Div. Rev. Stat. 1879; re-en. Sec. 50, 4th Div. Comp. Stat. 1887.

This section en. Sec. 496, Pen. C. 1895; re-en. Sec. 8359, Rev. C. 1907; re-en. Sec. 11030, R. C. M. 1921. Cal. Pen. C. Sec. 286.

Difficult to Prove or Disprove

In a prosecution for the infamous crime against nature (sodomy), courts should be assiduously on guard to warn the jury against yielding to the dictates of the intense prejudice naturally evoked by such a charge or convict upon slight evidence, since the charge is easily made, hard to prove and still harder to disprove. *State v. Keekonen*, 107 M 253, 266, 84 P 2d 341.

Information

Information held sufficient. *State v. Guerin*, 51 M 250, 252, 152 P 747.

References

Cited or applied as section 9, Chapter 1, Laws of 1911, in *State v. Kanakaris*, 54 M 180, 169 P 42.

Where Accomplice's Testimony Insufficiently Corroborated

Testimony in a prosecution for the infamous crime against nature (sodomy), offered as corroborative of that of a boy accomplice, to connect the defendant with the commission of the offense, held insufficient as simply showing opportunity, suspicion, or that he and the boy were together in same room when arrested, or that he had made gifts to the boy, or the boy's nervous condition, etc., and therefore insufficient to warrant conviction. *State v. Keekonen*, 107 M 253, 261, 84 P 2d 341.

References

Cited or applied as section 8359, Revised Codes, in *State v. Stone*, 40 M 88, 90, 105 P 89.

Sodomy

58 C.J. Sodomy § 2 et seq.
38 Am. Jur. 539, Sodomy.

94-4119. (11031) Penetration sufficient to complete the crime. Any sexual penetration, however slight, is sufficient to complete the crime against nature.

94-4119
Rel. matter
L. '51, c. 68
Sec. 1, p. 119

History: En. Sec. 497, Pen. C. 1895; re-en. Sec. 8360, Rev. C. 1907; re-en. Sec. 11031, R. C. M. 1921. Cal. Pen. C. Sec. 287.

References
Cited or applied as section 8360, Revised Codes, in State v. Guerin, 51 M 250, 252, 152 P 747.

CHAPTER 42

RESCUES AND ESCAPES

- Section 94-4201. Rescuing prisoners.
94-4202. Retaking goods from custody of officer.
94-4203. Escapes from state prison—punishment.
94-4204. Attempt to escape from state prison.
94-4205. Escapes from other than state prisons.
94-4206. Officers suffering convicts to escape.
94-4207. Assisting prisoner to escape.
94-4208. Carrying into prison things useful to aid in an escape.
94-4209. Expense of trial for escape.

94-4201. (10864) Rescuing prisoners. Every person who rescues, or attempts to rescue, or aids another person in rescuing, or attempting to rescue, any prisoner, from any prison or jail, or from any officer or person having him in lawful custody, is punishable as follows:

1. If such prisoner was in custody upon a conviction of felony punishable by death; by imprisonment in the state prison not less than one nor more than fourteen years.

2. If such prisoner was in custody upon a conviction of any other felony; by imprisonment in the state prison not less than six months nor more than five years.

3. If such prisoner was in custody upon a charge of felony; by a fine not exceeding one thousand dollars, and imprisonment in the county jail not exceeding two years.

4. If such prisoner was in custody otherwise than upon a charge or conviction of felony; by fine not exceeding five hundred dollars, and imprisonment in the county jail not exceeding six months.

History: Earlier acts were Secs. 112, 113, p. 295, Ood. Stat. 1871; re-en. Secs. 112, 113, 4th Div. Rev. Stat. 1879; re-en. Secs. 121, 122, 4th Div. Comp. Stat. 1887.

This section en. Sec. 210, Pen. C. 1895; re-en. Sec. 8220, Rev. C. 1907; re-en. Sec. 10864, R. C. M. 1921. Cal. Pen. C. Sec. 101.

Operation and Effect

On appeal by the state from a judgment of dismissal of a charge of assault in the second degree against one of four defendants, informed against jointly, committed on a peace officer to prevent the incarceration of one of them after arrest, evidence held to show that the crime was

committed as a result of a concerted design to effect a rescue, and that the court erred in advising the jury to return a verdict of not guilty. State v. Dennison, 94 M 159, 163, 21 P 2d 63.

Rescue—1, 5.

54 C.J. Rescue § 3 et seq.

See generally, 19 Am. Jur. 359, Escape, Prison Breaking, and Rescue.

Responsibility of persons participating in jail delivery for homicide committed by one of their number. 15 ALR 456.

What justifies escape or attempt to escape, or assistance in that regard. 56 ALR 666.

94-4202. (10865) Retaking goods from custody of officer. Every person who wilfully injures or destroys, or takes or attempts to take, or assists

any person in taking or attempting to take, from the custody of any officer or person, any personal property which such officer or person has in charge under any process of law, is guilty of a misdemeanor.

History: En. Sec. 211, Pen. C. 1895; re-en. Sec. 8221, Rev. C. 1907; re-en. Sec. 10865, R. C. M. 1921. Cal. Pen. C. Sec. 102.

Operation and Effect

Where the evidence showed the defendant had planned to commit robbery by taking personal property from the custody of an officer who had seized it as stolen property, an instruction offered on the theory based on this section and 94-1704, that he had merely committed a misde-

meanor in attempting to take and destroy evidence, and therefore could not be held guilty of murder in the first degree in the absence of a showing of premeditation, deliberation and malice, was properly refused as not applicable to the evidence. *State v. Reagin*, 64 M 481, 487 et seq., 210 P 86.

Rescue—1.

54 C.J. Rescue § 21 et seq.

94-4203. (10866) Escapes from state prison—punishment. Every prisoner confined in state prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the state prison for a term of not less than one year nor more than ten years; said second term of imprisonment to commence from the time he would have otherwise been discharged from said prison.

History: En. Sec. 220, Pen. C. 1895; re-en. Sec. 8222, Rev. C. 1907; re-en. Sec. 10866, R. C. M. 1921. Cal. Pen. C. Sec. 105.

Escape—4, 13.

30 C.J.S. Escape §§ 14-17, 28.

See generally, 19 Am. Jur. 359, Escape, Prison Breaking, and Rescue.

Escape or prison breach as affected by means employed to effect it. 10 ALR 148.

Responsibility of persons participating in jail delivery for homicide committed by one of their number. 15 ALR 456.

What justifies escape or attempt to escape, or assistance in that regard. 56 ALR 666.

94-4204. (10867) Attempt to escape from state prison. Every prisoner confined in the state prison for a term less than for life, who attempts to escape from such prison, is punishable by imprisonment in the state prison for a term not less than one nor more than ten years, and, on conviction thereof, the term of imprisonment therefor shall commence from the time such convict would otherwise have been discharged from said prison.

History: En. Sec. 221, Pen. C. 1895; re-en. Sec. 8223, Rev. C. 1907; re-en. Sec. 10867, R. C. M. 1921. Cal. Pen. C. Sec. 106.

Escape—5½.

30 C.J.S. Escape §§ 9-12.

See generally, 19 Am. Jur. 359, Escape, Prison Breaking, and Rescue.

94-4205. (10868) Escapes from other than state prisons. Every prisoner confined in any other prison than the state prison, who escapes or attempts to escape therefrom, is guilty of a misdemeanor.

History: En. Sec. 222, Pen. C. 1895; re-en. Sec. 8224, Rev. C. 1907; re-en. Sec. 10868, R. C. M. 1921. Cal. Pen. C. Sec. 107.

Escapes from vocational school for girls, secs. 80-926, 80-927.

Cross-References

Escapes from industrial school, secs. 80-821 to 80-824.

Escape or prison breach as affected by means employed to effect it. 10 ALR 148.

94-4206. (10869) Officers suffering convicts to escape. Every keeper of a prison, sheriff, deputy sheriff, constable, or jailer, or person employed as a guard, who fraudulently contrives, procures, aids, connives at, or voluntarily permits the escape of any prisoner in custody, is punishable by im-

prisonment in the state prison not exceeding ten years, and fine not exceeding ten thousand dollars.

History: Ap. p. Sec. 102, p. 202, Ban-
nack Stat.; re-en. Sec. 114, p. 295, Cod.
Stat. 1871; re-en. Sec. 114, 4th Div. Rev.
Stat. 1879; re-en. Sec. 123, 4th Div. Comp.
Stat. 1887; en. Sec. 223, Pen. C. 1895;
re-en. Sec. 8225, Rev. C. 1907; re-en. Sec.
10869, R. C. M. 1921. Cal. Pen. C. Sec.
108.

Escape⇒3.

30 C.J.S. Escape § 4.

19 Am. Jur. 371, Escape, Prison Break-
ing, and Rescue, § 32.

Peace officer's liability for act of as-
sistant or deputy in permitting escape. 1
ALR 240.

94-4207. (10870) Assisting prisoner to escape. Every person who wil-
fully assists any prisoner confined in any prison, or in the lawful custody of
any officer or person, to escape, or in an attempt to escape from such prison
or custody, is punishable as provided in the preceding section.

History: Ap. p. Sec. 105, p. 202, Ban-
nack Stat.; re-en. Sec. 117, p. 296, Cod.
Stat. 1871; re-en. Sec. 117, 4th Div. Rev.
Stat. 1879; re-en. Sec. 126, 4th Div. Comp.
Stat. 1887; en. Sec. 224, Pen. C. 1895;
re-en. Sec. 8226, Rev. C. 1907; re-en. Sec.

10870, R. C. M. 1921. Cal. Pen. C. Sec.
109.

Escape⇒5.

30 C.J.S. Escape §§ 19-24.

94-4208. (10871) Carrying into prison things useful to aid in an escape.
Every person who carries or sends into a prison anything useful in aiding a
prisoner to make his escape, with intent thereby to facilitate the escape of
any prisoner confined therein, is punishable as provided in section 94-4206.

History: Ap. p. Sec. 103, p. 202, Ban-
nack Stat.; re-en. Sec. 115, p. 295, Cod.
Stat. 1871; re-en. Sec. 115, 4th Div. Rev.
Stat. 1879; re-en. Sec. 124, 4th Div. Comp.

Stat. 1887; en. Sec. 225, Pen. C. 1895;
re-en. Sec. 8227, Rev. C. 1907; re-en. Sec.
10871, R. C. M. 1921. Cal. Pen. C. Sec.
110.

94-4209. (10872) Expense of trial for escape. Whenever a trial takes
place of any person under any of the provisions of sections 94-4203 and
94-4204, and whenever a prisoner in the state prison shall be tried for any
crime committed therein, the county clerk of the county where such trial
is had shall make out a statement of all the costs incurred by the county
for the trial of such case, and of guarding and keeping such prisoner,
properly certified by a district judge of said county, which statement shall
be sent to the board of state prison commissioners for their approval; and
after such approval, said board must cause the amount of such costs to be
paid out of the money appropriated for the support of the state prison to
the county treasurer of the county where such trial was had.

History: En. Sec. 226, Pen. C. 1895;
re-en. Sec. 8228, Rev. C. 1907; re-en. Sec.
10872, R. C. M. 1921. Cal. Pen. C. Sec.
111.

Costs⇒294.

20 C.J.S. Costs § 442.

CHAPTER 43

ROBBERY

Section 94-4301. Robbery defined.

94-4302. What fear may be an element in robbery.

94-4303. Punishment of robbery.

94-4301. (10973) Robbery defined. Robbery is the felonious taking of
personal property in the possession of another, from his person or immediate
presence, and against his will, accomplished by means of force or fear.

History: En. Sec. 59, p. 188, Bannack Stat.; re-en. Sec. 71, p. 282, Cod. Stat. 1871; re-en. Sec. 71, 4th Div. Rev. Stat. 1879; re-en. Sec. 77, 4th Div. Comp. Stat. 1887; amd. Sec. 390, Pen. C. 1895; re-en. Sec. 8309, Rev. C. 1907; re-en. Sec. 10973, R. C. M. 1921. Cal. Pen. C. Sec. 211.

Cross-References

Taking property from one county to another, jurisdiction, sec. 94-5610.

Verdict, value of property, sec. 94-7410.

"Accomplished"

An instruction defining robbery in the language of this section except using the word "accompanied" instead of the word "accomplished," is reversible error. *State v. Johnson*, 26 M 9, 10, 66 P 290. See also *State v. Pemberton*, 39 M 530, 533, 104 P 556.

Evidence Admissible

Where defendant, while engaged in attempting to rob the safe on a train, robbed a mail clerk, on a prosecution for the robbery of the mail clerk it was proper to admit evidence as to all the details of the attempted robbery of the train, and a conspiracy therefor. *State v. Howard*, 30 M 518, 524, 77 P 50.

"Felonious Taking"

An instruction defining robbery, which omits to state "the taking" must be felonious, is prejudicial error. *State v. Oliver*, 20 M 318, 319, 50 P 1018. See also *State v. Rodgers*, 21 M 143, 144, 53 P 97.

Under the rule that once a fact is established, it is presumed to have remained as proved to exist until the contrary is shown, held, in a prosecution for robbery, in which defendant on appeal contended that the felonious taking of a sum of money from the person of the complaining witness had not been proven, that evidence that defendant knew that the witness nine days before had placed his wallet containing the money in his inside vest pocket where he kept his money, which pocket had been cut out after the witness had been knocked down, etc., was sufficient to establish the taking. *State v. Olson*, 87 M 389, 393, 287 P 938.

Force or Fear

The taking of personal property from the person or immediate presence of another, without resistance on his part, does not bring the offense within the definition of robbery, it being necessary that the element of force or fear should be present to constitute the crime. *State v. Paisley*, 36 M 237, 244, 92 P 566.

Id. Since this section does not define the degree of force necessary to constitute the taking of personal property from the person or immediate presence of another the crime of robbery, an information charging such offense need not allege the degree of force used in accomplishing it.

Though the crime of robbery can be accomplished only by means of force or fear, and is most frequently accompanied by an assault, proof of an assault without circumstances tending to show that it was resorted to as a means to prevent resistance, and in order to obtain property from the person or immediate presence of the one assaulted, falls far short of establishing the crime of an attempt to commit robbery. *State v. Hanson*, 49 M 361, 368, 141 P 669.

Sufficiency of the Indictment

An indictment which charges that the defendant committed the robbery by force and intimidation and by putting the person robbed in fear, is sufficient. *State v. Clancy*, 20 M 498, 501, 52 P 267.

An information on a prosecution for robbery, which charged that the property was taken by means of force and putting in fear, and that it was taken from the person and possession, and from the immediate presence of a specified person, does not charge more than one offense. *State v. Howard*, 30 M 518, 522, 77 P 50.

References

State v. Jackson, 71 M 421, 429, 230 P 370.

Robbery

54 C.J. Robbery § 2.

46 Am. Jur. 139, Robbery, § 2.

Taking property from the person by stealth as robbery. 8 ALR 359.

Intent to collect debt or claim as affecting robbery or assault to commit robbery. 13 ALR 151.

Retaking of money lost at gambling as robbery. 35 ALR 1461.

Retention of property, or attempt to escape, by force or putting in fear as equivalent to taking in that manner for purposes of robbery. 58 ALR 656.

Appropriation or removal without payment of property delivered in expectation of cash payment as robbery. 83 ALR 447.

When person from whom property is taken is deemed to have been in possession thereof. 123 ALR 1099.

May participant in robbery be convicted of receiving or concealing the stolen property. 136 ALR 1087.

94-4302. (10974) What fear may be an element in robbery. The fear mentioned in the last section may be either:

1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his, or member of his family; or,
2. The fear of an immediate and unlawful injury to the person or property of any one in the company of the person robbed at the time of the robbery.

History: En. Sec. 391, Pen. C. 1895; re-en. Sec. 8310, Rev. C. 1907; re-en. Sec. 10974, R. C. M. 1921. Cal. Pen. C. Sec. 212.

having been sufficient, the pleading was not vulnerable to attack. *State v. Paisley*, 36 M 237, 245, 92 P 566.

Operation and Effect

Example of an information sufficiently charging the fear necessary to constitute the crime of robbery as defined in this section. *State v. Gill*, 21 M 151, 153, 53 P 184.

Assuming that an information charging robbery was defective in not stating facts sufficient to allege fear, within the definition given in this section, on the part of the person robbed, still, the allegation of force, the alternative element of the crime,

References

Cited or applied as section 391, Penal Code, in *State v. Clancy*, 20 M 498, 502, 52 P 267.

Robbery↪7.

54 C.J. Robbery § 33 et seq.

46 Am. Jur. 145, Robbery, §§ 14 et seq.

Threat to arrest or prosecute and acts in connection therewith as force or putting in fear for purposes of robbery. 27 ALR 1299.

94-4303. (10975) Punishment of robbery. Robbery is punishable by imprisonment in the state prison for a term not less than one year.

History: En. Sec. 392, Pen. C. 1895; re-en. Sec. 8311, Rev. C. 1907; amd. Sec. 1, Ch. 102, L. 1921; re-en. Sec. 10975, R. C. M. 121. Cal. Pen. C. Sec. 213.

found to have been previously convicted in another state of burglary, is warranted by the law. *State v. Paisley*, 36 M 237, 248, 92 P 566.

Operation and Effect

A sentence to fifty years' imprisonment of one convicted of robbery, who is also

Robbery↪30.

54 C.J. Robbery § 204 et seq.

CHAPTER 44

SEDITION—CRIMINAL SYNDICALISM—DISPLAY OF RED FLAG

- Section 94-4401. Sedition defined.
 94-4402. Punishment for sedition.
 94-4403. Emergency clause.
 94-4404. Criminal syndicalism defined.
 94-4405. Sabotage defined.
 94-4406. Penalty for sabotage, criminal syndicalism and other offenses.
 94-4407. Penalty for certain unlawful assemblings to advocate forbidden acts.
 94-4408. Same—penalty for owner of premises.
 94-4409. Prohibition against exhibiting red flag or emblem.
 94-4410. Same—penalty.

94-4401. (10737) Sedition defined. Any person or persons who shall utter, print, write, or publish any disloyal, profane, violent, scurrilous, contemptuous, slurring, or abusive language about the United States, the government of the United States, or the form of government of the United States, or the constitution of the United States, or the soldiers or sailors of the United States, or the flag of the United States, or the uniform of the army or navy of the United States, or any language calculated to bring the form of government of the United States, or the constitution of the United

States, or the soldiers or sailors of the United States, or the flag of the United States, or the uniform of the army or navy of the United States, into contempt, scorn, contumely, or disrepute, or shall utter, print, write, or publish any language calculated to incite or inflame resistance to any duly constituted federal or state authority, or who shall display the flag of any foreign enemy, or who shall, by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in the United States of any thing or things, product or products, necessary or essential to the prosecution of any war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of any war; or who, in time of war in which the United States may be engaged, shall wilfully make or convey false reports or statements with intent to interfere with the operation or success of the military or naval forces of the United States, or promote the success of its enemy or enemies, or shall wilfully cause, or attempt to cause, disaffection in the military or naval forces of the United States, or who shall, by uttering, printing, writing, publishing, language spoken, or by any act or acts, interfere with, obstruct, or attempt to obstruct, the operation of any national selective draft law or the recruiting or the enlistment service of the United States, to the injury of the military or naval service thereof, shall be guilty of the crime of sedition.

History: En. Sec. 1, Ch. 77, L. 1919; re-en. Sec. 10737, R. C. M. 1921.

the two statutes being similar in all respects. *State v. Kahn*, 56 M 108, 121, 182 P 107.

NOTE.—The above section was first enacted as section 1, Chapter 11, Ex. L. 1918, commencing with the words, "Whenever the United States shall be engaged in war." The act of 1919 apparently repeals by implication the earlier act.

"Calculate" Defined

Primarily the word "calculate" means to compute mathematically, and it implies power to think, to reason, to plan. In its broader significance it means to intend, to purpose, to design; and as used in the sedition act, it is broad enough to imply an evil intent in the use of language "calculated to incite or inflame," etc. *State v. Kahn*, 56 M 108, 119, 182 P 107.

Constitutionality

The act defining sedition and prescribing the punishment therefor is not unconstitutional as infringing upon the exclusive war powers of congress. *State v. Kahn*, 56 M 108, 115, 182 P 107; *State v. Wyman*, 56 M 600, 605, 186 P 1.

The failure of the legislature to make evil intent an ingredient of the offense does not invalidate this law. *State v. Kahn*, 56 M 108, 118, 182 P 107.

How Affected by Federal Act

The construction of the federal espionage act by the supreme court of the United States, though not conclusive upon the state supreme court in construing the sedition act, is entitled to great respect,

"Intent"

The sedition act is valid, though intent is not made an ingredient of the crime; if intent is essential to its validity, the word "calculated," as used in that part of the act which provides that one who "shall utter language calculated to incite or inflame resistance," etc., shall be guilty of sedition, etc., is sufficiently broad to cover intent. *State v. Wyman*, 56 M 600, 605, 186 P 1.

While intent is not specifically made an element of the crime of sedition as defined by this section, the legislature inferentially made it such by the use of the word "calculated" when it made language "calculated to incite or influence resistance" to constituted authority a public offense. *State v. Smith*, 57 M 349, 188 P 644.

Id. The intent of the person deliberately writing or publishing a seditious article contrary to the provisions of this section is immaterial and not an ingredient of the crime of sedition.

Sufficiency of Information

An information alleging that defendant, in vile and vulgar language, voiced his opinion in a saloon, that the Industrial Workers of the World, of which he was an officer, would win the case of United States v. Haywood et al., then on trial in the state of Illinois, was insufficient to

charge sedition. *State v. Griffith*, 56 M 241, 242, 184 P 219.

An information charging sedition, in that defendant knowingly, unlawfully, etc., uttered and published disloyal, profane, violent, scurrilous, contemptuous, and abusive language concerning the soldiers and the uniform of the army of the United States, was defective for failure to set out the specific words characterizing his remarks as disloyal, contemptuous, etc. *State v. Wolf*, 56 M 493, 498, 185 P 556.

An information alleging in substance that defendant uttered language to the effect that the soldiers of the United States would commit the same atrocities as those reported to have been committed by German soldiers, that the soldiers of the United States were no better than German soldiers, etc., was sufficient to charge sedition. *State v. Wyman*, 56 M 600, 606, 186 P 1.

Id. Where, in defining an offense, a statute enumerates a series of acts, either

of which separately or all together may constitute the offense, all such acts may be charged in a single count, and an instruction of the court, in a prosecution for a violation of the sedition act, where the information contained a charge in the language of the statute, of committing the several acts, that if the jury found beyond a reasonable doubt that defendant made either of the statements charged they could convict, was not erroneous.

Information held sufficient to charge sedition in *State v. Brooks*, 57 M 480, 188 P 942.

Insurrection and Sedition—2.

46 C.J.S. Insurrection and Sedition § 3.

See generally, 47 Am. Jur. 609, Sedition, Sabotage, Criminal Syndicalism, Propaganda, and Antisocial Activities.

Validity of legislation directed against social or industrial propaganda deemed to be a dangerous tendency. 1 ALR 336.

94-4402. (10738) Punishment for sedition. Every person found guilty of the crime of sedition shall be punished for each offense by a fine of not less than two hundred dollars nor more than twenty thousand dollars, or by imprisonment in the state prison for not less than one year nor more than twenty years, or by both such fine and imprisonment. In the event of a fine imposed for violation of any of the provisions of this act and not paid, the guilty person shall be imprisoned for a period represented by a credit of two dollars per day until the amount of the fine is fully paid.

History: En. Sec. 2, Ch. 77, L. 1919;
re-en. Sec. 10738, R. C. M. 1921.

94-4403. (10739) Emergency clause. This act is hereby declared to be an emergency law and a law necessary for the immediate preservation of the public peace and safety.

History: En. Sec. 3, Ch. 77, L. 1919;
re-en. Sec. 10739, R. C. M. 1921.

94-4404. (10740) Criminal syndicalism defined. Criminal syndicalism is hereby defined to be the doctrine which advocates crime, violence, force, arson, destruction of property, sabotage, or other unlawful acts or methods, or any such acts, as a means of accomplishing or effecting industrial or political ends, or as a means of effecting industrial or political revolution.

History: En. Sec. 1, Ch. 7, Ex. L. 1918;
re-en. Sec. 10740, R. C. M. 1921.

94-4405. (10741) Sabotage defined. Sabotage is hereby defined to be malicious, felonious, intentional, or unlawful damage, injury, or destruction of real or personal property, of any form whatsoever, of any employer, or owner, by his or her employee or employees, or any employer or employers, or by any person or persons, at their own instance, or at the instance, request, or instigation of such employees, employers, or any other person.

History: En. Sec. 2, Ch. 7, Ex. L. 1918;
re-en. Sec. 10741, R. C. M. 1921.

See generally, 47 Am. Jur. 609, Sedition, Sabotage, Criminal Syndicalism, Propaganda, and Antisocial Activities.

94-4406. (10742) Penalty for sabotage, criminal syndicalism and other offenses. Any person who, by word of mouth or writing, advocates, suggests, or teaches the duty, necessity, propriety, or expediency of crime, criminal syndicalism, or sabotage, or who shall advocate, suggest, or teach the duty, necessity, propriety, or expediency of doing any act of violence, the destruction of or damage to any property, the bodily injury to any person or persons, or the commission of any crime or unlawful act, as a means of accomplishing or effecting any industrial or political ends, change, or revolution, or who prints, publishes, edits, issues, or knowingly circulates, sells, distributes, or publicly displays any books, pamphlets, paper, handbill, poster, document, or written or printed matter in any form whatsoever, containing, advocating, advising, suggesting, or teaching crime, criminal syndicalism, sabotage, the doing of any act of violence, the destruction of or damage to any property, the injury to any person, or the commission of any crime or unlawful act, as a means of accomplishing, effecting, or bringing about any industrial or political ends, or change, or as a means of accomplishing, effecting, or bringing about any industrial or political revolution, or who shall openly, or at all, attempt to justify, by word of mouth or writing, the commission or the attempt to commit sabotage, any act of violence, the destruction of or damage to any property, the injury of any person, or the commission of any crime or unlawful act, with the intent to exemplify, spread, or teach or suggest criminal syndicalism, or organizes, or helps to organize, or become a member of, or voluntarily assembles with, any society or assemblage of persons formed to teach or advocate, or which teaches, advocates, or suggests the doctrine of criminal syndicalism, sabotage, or the necessity, propriety, or expediency of doing any act of violence, or the commission of any crime or unlawful act, as a means of accomplishing or effecting any industrial or political ends, change, or revolution, is guilty of a felony; and, upon conviction thereof, shall be punished by imprisonment in the state penitentiary for a term of not less than one year or more than five years, or by a fine of not less than two hundred dollars or not more than one thousand dollars, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 7, Ex. L.
1918; re-en. Sec. 10742, R. C. M. 1921.

94-4407. (10743) Penalty for certain unlawful assemblings to advocate forbidden acts. Wherever two or more persons assemble or consort for the purpose of advocating, teaching, or suggesting the doctrine of criminal syndicalism, as defined in this act, or to advocate, teach, suggest, or encourage sabotage, as defined in this act, or the duty, necessity, propriety, or expediency of doing any act of violence, the destruction of or damage to any property, the bodily injury to any person or persons, or the commission of any crime or unlawful act, as a means of accomplishing or effecting any industrial or political ends, change, or revolution, it is hereby declared unlawful, and every person voluntarily participating therein, by his presence aids or instigates, is guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the state prison for not less than one year or more than five years, or by a fine of not less than

two hundred dollars or more than one thousand dollars, or by both such imprisonment and fine.

History: En. Sec. 4, Ch. 7, Ex. L. **Cross-Reference**
1918; re-en. Sec. 10743, R. C. M. 1921. **Unlawful assembly, punishment, sec.**
94-35-243.

94-4408. (10744) Same—penalty for owner of premises. The owner, lessee, agent, superintendent, or person in charge or occupation of any place, building, room or rooms, or structure, who knowingly permits therein any assembly or consort of persons prohibited by the provisions of the preceding section, or who, after notification that the place or premises, or any part thereof, is or are so used, permits such use to be continued, is guilty of a misdemeanor, and punishable, upon conviction thereof, by imprisonment in the county jail for not less than sixty days or for not more than one year, or by a fine of not less than one hundred dollars or more than five hundred dollars, or by both such imprisonment and fine.

History: En. Sec. 5, Ch. 7, Ex. L.
1918; re-en. Sec. 10744, R. C. M. 1921.

94-4409. (10745) Prohibition against exhibiting red flag or emblem. In any public street, avenue, alley, meeting-hall, or place within the state of Montana, it shall be unlawful to carry, display, exhibit, or cause to be carried, displayed, or exhibited any red flag, red banner, or red emblem, commonly accepted as symbolic of social or industrial revolution, or any flag, banner, or emblem, bearing words, inscriptions, or representations opposed to organized government, of or within the United States; provided, that nothing herein shall be construed to deny the right of every citizen peaceably to assemble for the purpose of securing redress of grievances in the manner provided by law.

History: En. Sec. 1, Ch. 25, L. 1919;
re-en. Sec. 10745, R. C. M. 1921.

94-4410. (10746) Same—penalty. Any person violating the provisions of this act shall, upon conviction, be punishable by imprisonment in the county jail for a period not to exceed six months, or shall be fined in a sum not to exceed five hundred dollars, or shall be imprisoned in the state prison for a period of not less than one nor more than five years, or shall suffer both such fine and imprisonment.

History: En. Sec. 2, Ch. 25, L. 1919;
re-en. Sec. 10746, R. C. M. 1921.

CHAPTER 45

TREASON AND MISPRISION OF TREASON

Section 94-4501. Treason, who only can commit.
94-4502. Misprision of treason.

94-4501. (10735) Treason, who only can commit. Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the state. The punishment of treason is death.

History: En. Sec. 50, Pen. C. 1895; re-en. Sec. 8122, Rev. C. 1907; re-en. Sec. 10735, R. C. M. 1921. Cal. Pen. C. Sec. 37.

TreasonⒸ1.
63 C.J. Treason § 1.

See generally 47 Am. Jur. 609, Sedition, Sabotage, Criminal Syndicalism, Propaganda, and Antisocial Activities.

94-4502. (10736) Misprision of treason. Misprision of treason is the knowledge and concealment of treason, without otherwise assenting to or participating in the crime. It is punishable by imprisonment in the state prison for a term not exceeding five years.

History: En. Sec. 51, Pen. C. 1895; TreasonⒸ8.
re-en. Sec. 8123, Rev. C. 1907; re-en. Sec. 63 C.J. Treason § 4.
10736, R. C. M. 1921. Cal. Pen. C. Sec. 38.

CHAPTER 46

VIOLATING SEPULTURE AND REMAINS OF THE DEAD

Section 94-4601. Unlawful mutilation or removal of dead bodies.
94-4602. Unlawful removal of dead body from grave for dissection, etc.
94-4603. Who are charged with the duty of burial.
94-4604. Punishment for omitting to bury.
94-4605. Who are entitled to custody of a body.
94-4606. Arresting or attaching a dead body.
94-4607. Defacing tombs or monuments.

94-4601. (11032) Unlawful mutilation or removal of dead bodies. Every person who mutilates, disinters, or removes from the place of sepulture the dead body of a human being without authority of law is guilty of felony. But the provisions of this section do not apply to any person who removes the dead body of a relative or friend for reinterment.

History: En. Sec. 2, p. 114, L. 1889; Dead BodiesⒸ7.
amd. Sec. 510, Pen. C. 1895; re-en. Sec. 25 C.J.S. Dead Bodies § 10.
8361, Rev. C. 1907; re-en. Sec. 11032, 15 Am. Jur. 857, Dead Bodies, §§ 37 et
R. C. M. 1921. Cal. Pen. C. Sec. 290. seq.

94-4602. (11033) Unlawful removal of dead body from grave for dissection, etc. Every person who removes any part of the dead body of a human being from any grave or other place where the same has been buried, or from any place where the same has been deposited while awaiting burial, with intent to sell the same, or dissect, without authority of law, or from malice or wantonness, is punishable by imprisonment in the state prison not exceeding five years.

History: En. Sec. 3, p. 114, L. 1889; 8362, Rev. C. 1907; re-en. Sec. 11033, R.
amd. Sec. 511, Pen. C. 1895; re-en. Sec. C. M. 1921. Cal. Pen. C. Sec. 291.

94-4603. (11034) Who are charged with the duty of burial. The duty of burying the body of a deceased person devolves upon the persons herein-after specified:

1. If the deceased was a married man or woman, the duty devolves upon the husband, or wife.

2. If the deceased was not a married woman, but left any kindred, the duty of burial devolves upon the person or persons in the same degree nearest of kin to the deceased, being of adult age and within this state, if possessed of sufficient means to defray the necessary expenses.

3. If the deceased left no husband or kindred answering the foregoing description, the duty of burial devolves upon the coroner conducting an inquest upon the body of the deceased, if any such inquest is held; if

there is none, then upon the persons charged with the support of the poor in the locality in which the death occurs.

4. In case the person upon whom the duty of burial is cast by the foregoing provisions omits to make such burial within a reasonable time, the duty devolves upon the person next specified, and if all omit to act it devolves upon the tenant, or if there is no tenant, then the owner of the premises or master, or if there is no master, upon the owner of the vessel in which the death occurs or the body is found.

History: En. Sec. 512, Pen. C. 1895;	Dead Bodies↪3.
re-en. Sec. 8363, Rev. C. 1907; re-en. Sec.	25 C.J.S. Dead Bodies §§ 3, 5.
11034, R. C. M. 1921. Cal. Pen. C. Sec. 292.	15 Am. Jur. 832, Dead Bodies, § 7.

94-4604. (11035) Punishment for omitting to bury. Every person upon whom the duty of making burial of the remains of a deceased person is imposed by law who omits to perform that duty within a reasonable time is guilty of a misdemeanor, and, in addition to the punishment prescribed therefor, is liable to pay to the person performing the duty in his stead treble the expenses incurred by the latter in making the burial, to be recovered in a civil action.

History: En. Sec. 513, Pen. C. 1895;	Dead Bodies↪7, 9.
re-en. Sec. 8364, Rev. C. 1907; re-en. Sec.	25 C.J.S. Dead Bodies §§ 8, 9, 10.
11035, R. C. M. 1921. Cal. Pen. C. Sec.	15 Am. Jur. 857, Dead Bodies, § 38.

293.

94-4605. (11036) Who are entitled to custody of a body. The person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purpose of burying it, except that in the case in which an inquest is required to be held upon a dead body by a coroner, such coroner is entitled to its custody until such inquest has been completed.

History: En. Sec. 514, Pen. C. 1895;	Dead Bodies↪1.
re-en. Sec. 8365, Rev. C. 1907; re-en. Sec.	25 C.J.S. Dead Bodies § 2.
11036, R. C. M. 1921. Cal. Pen. C. Sec.	15 Am. Jur. 831, Dead Bodies, §§ 6 et

294. seq.

94-4606. (11037) Arresting or attaching a dead body. Every person who arrests or attaches any dead body of a human being, upon any debt or demand whatever, or detains, or claims to detain it for any debt or demand, or upon any pretended lien or charge, is guilty of a misdemeanor.

History: En. Sec. 515, Pen. C. 1895;	11037, R. C. M. 1921. Cal. Pen. C. Sec.
re-en. Sec. 8366, Rev. C. 1907; re-en. Sec.	295.

94-4607. (11038) Defacing tombs or monuments. Every person who wilfully and maliciously defaces, breaks, destroys, or removes any tomb, monument, or gravestone erected to any deceased person, or any memento or memorial, or any ornamental plant, tree, or shrub appertaining to the place of burial of a human being, or who shall mark, deface, injure, destroy, or remove any fence, post, rail, or wall, of any cemetery or graveyard, is guilty of a misdemeanor.

History: En. Sec. 1, p. 114, L. 1889;	Cemeteries↪22.
amd. Sec. 516, Pen. C. 1895; re-en. Sec.	14 C.J.S. Cemeteries § 37.
8367, Rev. C. 1907; re-en. Sec. 11038,	
R. C. M. 1921. Cal. Pen. C. Sec. 296.	

CHAPTER 47

PUNISHMENTS—ATTEMPTS AND OTHER GENERAL PROVISIONS

- Section 94-4701. Acts made punishable by different provisions of this code.
 94-4702. Acts punishable under foreign laws.
 94-4703. Foreign conviction or acquittal.
 94-4704. Contempts, how punishable.
 94-4705. Mitigation of punishment in certain cases.
 94-4706. Aiding in misdemeanor.
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 94-4708. Removal from office for neglect of official duty.
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 94-4711. Attempts to commit crime, how punishable.
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 94-4713. Second offense, how punished after conviction of former offense.
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 94-4717. When term of imprisonment commences, etc.
 94-4718. Imprisonment for life.
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 94-4720. Civil rights of convict suspended.
 94-4721. Civil death.
 94-4722. Limitations to two preceding sections.
 94-4723. Convict competent witness.
 94-4724. Person of convict protected.
 94-4725. Forfeitures.

94-4701. (11581) Acts made punishable by different provisions of this code. An act or omission which is made punishable in different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. In the cases specified in sections 94-35-115, 94-4714 and 94-4715, the punishment therein prescribed must be substituted for those prescribed for a first offense, if the previous conviction is charged in the indictment or information and found by the jury.

History: En. Sec. 1220, Pen. C. 1895; re-en. Sec. 8885, Rev. C. 1907; re-en. Sec. 11581, R. C. M. 1921. Cal. Pen. C. Sec. 654.

Criminal Law 187, 1208 (3).

Operation and Effect 22 C.J.S. Criminal Law §§ 269, 270, 276;
 For a discussion of the history and ap- 24 C.J.S. Criminal Law § 1982.

94-4702. (11582) Acts punishable under foreign laws. An act or omission declared punishable by this code is not less so because it is also punishable under the laws of another state, government, or country, unless the contrary is expressly declared.

History: En. Sec. 1221, Pen. C. 1895; re-en. Sec. 8886, Rev. C. 1907; re-en. Sec. 11582, R. C. M. 1921. Cal. Pen. C. Sec. 655.

Criminal Law 16.

22 C.J.S. Criminal Law § 16.

94-4703. (11583) Foreign conviction or acquittal. Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another state, government, or country, founded upon the act or

omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense.

History: En. Sec. 1222, Pen. C. 1895; re-en. Sec. 8887, Rev. C. 1907; re-en. Sec. 11583, R. C. M. 1921. Cal. Pen. C. Sec. 656.

15 Am. Jur. 67, Criminal Law, §§ 393 et seq.

Conviction or acquittal under federal statute as bar to prosecution under state or territorial statute, or vice versa. 16 ALR 1231.

Criminal LawⒸ186, 187.

22 C.J.S. Criminal Law §§ 264-266, 268, 269, 270, 276, 476.

94-4704. (11584) Contempts, how punishable. A criminal act is not the less punishable as a crime because it is also declared to be punishable as a contempt.

History: En. Sec. 1223, Pen. C. 1895; re-en. Sec. 8888, Rev. C. 1907; re-en. Sec. 11584, R. C. M. 1921. Cal. Pen. C. Sec. 657.

Criminal LawⒸ26.

22 C.J.S. Criminal Law § 37.

94-4705. (11585) Mitigation of punishment in certain cases. When it appears, at the time of passing sentence upon a person convicted upon indictment or information, that such person has already paid a fine or suffered an imprisonment for the act of which he stands convicted, under an order judging it a contempt, the court authorized to pass sentence may mitigate the punishment to be imposed, in its discretion.

History: En. Sec. 1224, Pen. C. 1895; re-en. Sec. 8889, Rev. C. 1907; re-en. Sec. 11585, R. C. M. 1921. Cal. Pen. C. Sec. 658.

Criminal LawⒸ1208 (1).

24 C.J.S. Criminal Law §§ 1980, 1986.

94-4706. (11586) Aiding in misdemeanor. Whenever an act is declared a misdemeanor, and no punishment for counseling or aiding in the commission of such act is expressly prescribed by law, every person who counsels or aids another in the commission of such act is guilty of a misdemeanor.

History: En. Sec. 1225, Pen. C. 1895; re-en. Sec. 8890, Rev. C. 1907; re-en. Sec. 11586, R. C. M. 1921. Cal. Pen. C. Sec. 659.

References

Cited or applied as section 1225, Penal Code, in *State v. Woodman*, 26 M 348, 354, 67 P 1118.

Criminal LawⒸ59 (5).

22 C.J.S. Criminal Law § 79.

94-4707. (11587) Sending letters, when deemed complete. In the various cases in which the sending of a letter is made criminal by this code, the offense is deemed complete from the time when such letter is deposited in any postoffice, or any other place, or delivered to any person, with intent that it shall be forwarded.

History: En. Sec. 1226, Pen. C. 1895; re-en. Sec. 8891, Rev. C. 1907; re-en. Sec.

11587, R. C. M. 1921. Cal. Pen. C. Sec. 660.

94-4708. (11588) Removal from office for neglect of official duty. In addition to the penalty affixed by express terms, to every neglect or violation of official duty on the part of public officers—state, county, city, town, or township—where it is not so expressly provided, they may, in the discretion of the court, be removed from office.

History: En. Sec. 1227, Pen. C. 1895; re-en. Sec. 8892, Rev. C. 1907; re-en. Sec. 11588, R. C. M. 1921. Cal. Pen. C. Sec. 661.

OfficersⒸ66.

46 C.J. Officers § 147 et seq.

94-4709. (11589) Omission to perform duty, when punishable. No person is punishable for an omission to perform an act, where such act has been performed by another person acting in his behalf, and competent by law to perform it.

History: En. Sec. 1228, Pen. C. 1895; 11589, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8893, Rev. C. 1907; re-en. Sec. 662.

94-4710. (11590) Attempts to commit crime, when punishable. An act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime. Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the court, in its discretion, discharges the jury and directs such person to be tried for such crime.

History: En. Sec. 1229, Pen. C. 1895; re-en. Sec. 8894, Rev. C. 1907; re-en. Sec. 11590, R. C. M. 1921. Cal. Pen. C. Sec. 663.

Operation and Effect

Testimony of a witness that accused, charged with an attempt to rob, had solicited the witness some six days before the assault to join in committing robbery, was too remote to supply the basis for an inference of the specific intent required, under this section, to be present at the time of the alleged crime. *State v. Hanson*, 49 M 361, 368, 141 P 669.

One charged with an attempt to commit a crime (maiming of an animal) may properly be convicted as charged, under this section, even though the evidence shows that the crime was completed. *State v. Benson*, 91 M 21, 25, 5 P 2d 223.

References

Cited or applied as section 8894, Revised Codes, in *State v. Rains*, 53 M 424, 426, 164 P 540; *State v. Reagin*, 64 M 481, 490, 210 P 86; *State v. Hennessy*, 73 M 20, 23, 234 P 1094.

Criminal Law 44.

22 C.J.S. Criminal Law §§ 73, 75-77.

94-4711. (11591) Attempts to commit crime, how punishable. Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempt, as follows:

1. If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, or by imprisonment in the county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in the county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so attempted.

2. If the offense so attempted is punishable by imprisonment in the state prison for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year.

3. If the offense so attempted is punishable by a fine, the offender convicted of such an attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction for the offense so attempted.

4. If the offense so attempted is punishable by a fine and imprisonment, the offender convicted of such attempt may be punished by both such imprisonment and fine, not exceeding one-half the longest term of imprisonment and one-half the largest fine which may be imposed upon a conviction for the offense so attempted.

History: Ap. p. Sec. 191, p. 314, Cod. Stat. 1871; re-en. Sec. 218, 4th Div. Rev. Stat. 1879; re-en. Sec. 285, 4th Div. Comp. Stat. 1887; en. Sec. 1230, Pen. C. 1895; re-en. Sec. 8895, Rev. C. 1907; re-en. Sec. 11591, R. C. M. 1921. Cal. Pen. C. Sec. 664.

Operation and Effect

Where the evidence is not before the appellate court, it will be presumed that the trial court properly fixed the punishment on a conviction for attempt to commit burglary. *State v. Mish*, 36 M 168, 175, 92 P 459.

In view of this section and of section 94-4118 and of section 94-4718, the court had authority to fix the punishment of one found guilty of an attempt to commit the infamous crime against nature, at fifteen years, since, in its discretion, it could have sentenced defendant, if guilty of the infamous crime itself, to a term of thirty years, and hence could, with propriety, fix one-half that term upon conviction for the attempt. *State v. Stone*, 40 M 88, 92, 105 P 89.

94-4712. (11592) Restrictions upon the preceding sections. The last two sections do not protect a person who, in attempting unsuccessfully to commit a crime, accomplishes the commission of another and different crime, whether greater or less in guilt, from suffering the punishment prescribed by law for the crime committed.

History: En. Sec. 1231, Pen. C. 1895; re-en. Sec. 8896, Rev. C. 1907; re-en. Sec. 11592, R. C. M. 1921. Cal. Pen. C. Sec. 665.

94-4713. (11593) Second offense, how punished after conviction of former offense. Every person who, having been convicted of any offense punishable by imprisonment in the state prison, commits any crime after such conviction, is punishable therefor as follows:

1. If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender would be punishable by imprisonment in the state prison for any term exceeding five years, such person is punishable by imprisonment in the state prison not less than ten years.

2. If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the state prison for five years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the state prison not exceeding ten years.

3. If the subsequent conviction is for petit larceny, or any attempt to commit an offense which, if committed, would be punishable by imprisonment in the state prison not exceeding five years, then the person convicted of such subsequent offense is punishable by imprisonment in the state prison not exceeding five years.

References

Cited or applied as section 191, p. 314, Codified Statutes 1871, in *Territory v. Hildebrand*, 2 M 426, 431.

Criminal Law 1208 (7).

24 C.J.S. Criminal Law § 1987.

14 Am. Jur. 813, Criminal Law, §§ 65 et seq.

Pregnancy as element of offense of attempt to procure a miscarriage. 10 ALR 314.

What amounts to attempt to manufacture intoxicating liquor within criminal law. 22 ALR 225.

What constitutes attempt to commit robbery. 55 ALR 714.

Charge of attempting to obtain property by false pretenses as affected by failure to deceive prosecutor or fact that prosecutor did not rely on pretenses. 89 ALR 342.

What conduct amounts to an overt act or act done toward commission of murder so as to sustain charge of attempt to murder. 98 ALR 918.

Attempt to obtain money under false pretenses predicated upon receipt or claim of benefits under insurance policy. 135 ALR 1157.

Criminal Law 44.

22 C.J.S. Criminal Law §§ 73, 75-77.

History: En. Sec. 1232, Pen. C. 1895; re-en. Sec. 8897, Rev. C. 1907; re-en. Sec. 11593, R. C. M. 1921. Cal. Pen. C. Sec. 666.

Operation and Effect

Under this section and sections 93-4903, 94-7407 and 94-7412, a judgment that defendant "be imprisoned in the state prison for the term of ten years, five years upon the conviction for assault in the second degree, and five years for the prior conviction of a felony as by the statute made and provided," is not void as to the five years for former conviction. The division of the term into equal parts, and the assignment of each part to its supposed function as a measure of punishment is merely redundant, and not ground for reversal, under sections 94-8207 and 94-6434. *State v. Connors*, 27 M 227, 228, 70 P 715.

A sentence to fifty years' imprisonment of one convicted of robbery, who is also found to have been previously convicted in another state of burglary, is warranted by the law. *State v. Paisley*, 36 M 237, 248, 92 P 566.

Held, that where defendant, charged with burglary and three prior convictions, at the opening of the trial admitted the prior convictions, the court did not err in permitting knowledge of the prior convictions to go to the jury by allowing the county attorney to read the informa-

tion charging such convictions, in overruling an objection to the question asked defendant on cross-examination as to the prior convictions, or in instructing the jury that if they found the defendant guilty of burglary they should then consider the matter of the former convictions, giving the provisions of the statute fixing punishment for that crime when aggravated by prior convictions of felonies, in view of the provisions of section 94-7201, requiring the county attorney to state the case and offer evidence in support of the prosecution, and the fact that without such knowledge the jury could not intelligently fix the punishment to fit the crime. *State v. O'Neill*, 76 M 526, 534, 248 P 215.

References

Cited or applied as section 8897, Revised Codes, in *State v. Collins*, 53 M 213, 163 P 102; *State v. Livermore*, 59 M 362, 364, 196 P 977; *State ex rel. Williams v. Henry*, — M —, 174 P 2d 220, 222.

Criminal Law \S 1211.

24 C.J.S. Criminal Law \S 1973.

25 Am. Jur. 259, Habitual Criminals and Subsequent Offenders.

Constitutionality and construction of statute enhancing penalty for second or subsequent offense. 58 ALR 20; 82 ALR 345; 116 ALR 209; 132 ALR 91 and 139 ALR 673.

94-4714. (11594) Second offense, how punished after conviction of attempt to commit a state prison offense. Every person who, having been convicted of petit larceny, or attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the state prison, commits any crime after such conviction, is punishable as follows:

1. If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the state prison for life, at the discretion of the court, such person is punishable by imprisonment in such prison during life.

2. If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the state prison for any term less than life, such person is punishable by imprisonment in such prison for the longest term prescribed upon a conviction for such first offense.

3. If the subsequent conviction is for petit larceny, or for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the state prison, then such person is punishable by imprisonment in such prison not exceeding five years.

History: En. Sec. 1233, Pen. C. 1895; 11594, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8898, Rev. C. 1907; re-en. Sec. 667.

94-4715. (11595) Foreign conviction for former offense. Every person who has been convicted in any other state, government, or country, of an

offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed in this state in the manner prescribed in the last two sections, and to the same extent as if such first conviction had taken place in a court of this state.

History: En. Sec. 1234, Pen. C. 1895; re-en. Sec. 8899, Rev. C. 1907; re-en. Sec. 11595, R. C. M. 1921. Cal. Pen. C. Sec. 668.

Operation and Effect

It is immaterial whether the crime for which the defendant is alleged to have

been previously convicted is a felony in the foreign state. *State v. Paisley*, 36 M 237, 247, 92 P 566.

Criminal Law—1202 (1).

24 C.J.S. Criminal Law §§ 1960, 1964.

25 Am. Jur. 268, Habitual Criminals and Subsequent Offenders, § 18.

94-4716. (11596) Second term of imprisonment, when to commence.

When any person has been convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be.

History: En. Sec. 1235, Pen. C. 1895; re-en. Sec. 8900, Rev. C. 1907; re-en. Sec. 11596, R. C. M. 1921. Cal. Pen. C. Sec. 669.

State v. Hukoveh, 115 M 125, 131, 139 P 2d 538.

References

In re *Pyle*, 72 M 494, 498, 234 P 254; *State v. Sorenson*, 75 M 30, 36, 241 P 616.

When Motion to Change Plea to Not Guilty Properly Denied

Where defendant pleaded guilty on two charges of murder, was sentenced to life imprisonment on each, and three years later filed motions for leave to withdraw his pleas of guilty and substitute pleas of not guilty by reason of insanity caused by alcoholism, alleging in his affidavit that he pleaded on advice of his attorney, and was unaware of the effect of this section, held, that the evidence was sufficient to deny the motions, that the court did not abuse its discretion in finding him sane when he pled, that he was faithfully represented, and that he was aware that he couldn't escape jury trial and possible death sentence if he had done otherwise.

Criminal Law—1216 (1).

24 C.J.S. Criminal Law § 1995.

15 Am. Jur. 121, Criminal Law, §§ 464 et seq.

Sentences by different courts as concurrent. 5 ALR 380.

Effect of court's attempt to fix the beginning or end of period of imprisonment. 69 ALR 1177.

When sentences imposed by same court run concurrently or consecutively; and definiteness of direction with respect thereto. 70 ALR 1511.

Sentence for new offense committed while accused was at large on parole or conditional release as concurrent or consecutive. 116 ALR 811.

94-4717. (11597) When term of imprisonment commences, etc. The term of imprisonment fixed by the judgment in a criminal action commences to run only upon the actual delivery of the defendant at the place of imprisonment, and if, thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment, and subsequently returned thereto, the time during which he was at large must not be computed as part of such term.

History: En. Sec. 1236, Pen. C. 1895; re-en. Sec. 8901, Rev. C. 1907; re-en. Sec. 11597, R. C. M. 1921. Cal. Pen. C. Sec. 670.

15 Am. Jur. 108, Criminal Law, §§ 448 et seq.

What constitutes commencement of service of sentence, depriving court of power to change sentence. 159 ALR 161.

References

Anderson et al. v. Wirkman, 67 M 176, 187, 215 P 224.

94-4718. (11598) Imprisonment for life. Whenever any person is declared punishable for a crime by imprisonment in the state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than that prescribed.

History: En. Sec. 1237, Pen. C. 1895; re-en. Sec. 8902, Rev. C. 1907; re-en. Sec. 11598, R. C. M. 1921. Cal. Pen. C. Sec. 671. Codes, in State v. Stone, 40 M 88, 90, 105 P 89.

Criminal Law 1208 (4).

24 C.J.S. Criminal Law §§ 1980, 1986.

References

Cited or applied as section 8902, Revised

94-4719. (11599) Fine may be added to imprisonment. Upon conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding two hundred dollars, in addition to the punishment prescribed.

History: En. Sec. 1238, Pen. C. 1895; re-en. Sec. 8903, Rev. C. 1907; re-en. Sec. 11599, R. C. M. 1921. Cal. Pen. C. Sec. 672.

Criminal Law 1215.

24 C.J.S. Criminal Law § 1991.

94-4720. (11600) Civil rights of convict suspended. A sentence of imprisonment in the state prison for any term less than life suspends all the civil rights of the person so sentenced, and forfeits all public offices and private trusts, authority, or power, during such imprisonment.

History: En. Sec. 154, p. 217, Bannack Stat.; re-en. Sec. 186, p. 313, Cod. Stat. 1871; re-en. Sec. 213, 4th Div. Rev. Stat. 1879; re-en. Sec. 279, 4th Div. Comp. Stat. 1887; amd. Sec. 1239, Pen. C. 1895; re-en. Sec. 8904, Rev. C. 1907; re-en. Sec. 11600, R. C. M. 1921. Cal. Pen. C. Sec. 673.

knowledge of the juror's incompetency did not come to counsel until after the trial. Stagg v. Stagg, 96 M 573, 598, 32 P 2d 856.

References

State v. Stein, 60 M 441, 446, 199 P 278.

Convicts 1.

18 C.J.S. Convicts §§ 2, 4.

18 Am. Jur. 230, Elections, § 80; 42 Am. Jur. 923, Public Officers, §§ 55 et seq.

Operation and Effect

Where counsel had the opportunity to inquire into the qualifications of a juror, and exercised that right, but failed to inquire whether he had ever been convicted of a felony, he will be held to have waived any objection thereto even though

Conviction in federal court, or in court of another state or country, as disqualification to vote at election. 149 ALR 1075.

94-4721. (11601) Civil death. A person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead.

History: En. Sec. 1240, Pen. C. 1895; re-en. Sec. 8905, Rev. C. 1907; re-en. Sec. 11601, R. C. M. 1921. Cal. Pen. C. Sec. 674.

References

State v. Stein, 60 M 441, 447, 199 P 278.

16 Am. Jur. 11, Death, §§ 2 et seq.

94-4722. (11602) Limitations to two preceding sections. The provisions of the last two preceding sections must not be construed to render the person therein mentioned incapable of making and acknowledging a sale or conveyance of property.

History: En. Sec. 1241, Pen. C. 1895; re-en. Sec. 8906, Rev. C. 1907; re-en. Sec. 11602, R. C. M. 1921. Cal. Pen. C. Sec. 675.

Convicts 3.

18 C.J.S. Convicts § 5.

94-4723. (11603) **Convict competent witness.** A person convicted of any offense is notwithstanding a competent witness in any cause or proceeding, civil or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his examination as such witness.

History: En. Sec. 1242, Pen. C. 1895; re-en. Sec. 8907, Rev. C. 1907; re-en. Sec. 11603, R. C. M. 1921. See Cal. Pen. C. Sec. 675. See also Sec. 714, N. Y. Penal Code.

Operation and Effect

Held, that the provision of this section to the effect that the conviction of a person of any offense may be proved for the purpose of affecting the weight of his testimony, refers to conviction of a felony, and that therefore refusal to permit cross-examination of a witness for the state as to his former conviction of a misdemeanor

was proper. *State v. Stein*, 60 M 441, 446, 199 P 278.

References

Cited or applied as section 8907, Revised Codes, in *State v. Smith*, 57 M 563, 190 P 107.

Witnesses⇒48 (1), 345 (1).

70 C.J. Witnesses §§ 133, 1045 et seq. 20 Am. Jur. 574, Evidence, § 678.

Constitutionality of statute restoring competency of convict as a witness. 63 ALR 982.

94-4724. (11604) **Person of convict protected.** The person of a convict sentenced to imprisonment in the state prison is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner as if he was not convicted or sentenced.

History: En. Sec. 1243, Pen. C. 1895; re-en. Sec. 8908, Rev. C. 1907; re-en. Sec. 11604, R. C. M. 1921. Cal. Pen. C. Sec. 676.

94-4725. (11605) **Forfeitures.** No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law; and all forfeitures to the state, in the nature of a deodand, or where any person shall flee from justice, are abolished.

History: En. Sec. 1244, Pen. C. 1895; re-en. Sec. 8909, Rev. C. 1907; re-en. Sec. 11605, R. C. M. 1921. Cal. Pen. C. Sec. 677.

References

Dorrell v. Clark et al., 90 M 585, 593, 4 P 2d 712.

Criminal Law⇒1205.

24 C.J.S. Criminal Law § 1974.

41 Am. Jur. 914, Prisons and Prisoners, § 40.

CHAPTER 48

RIGHTS OF DEFENDANT

- Section 94-4801. No person punishable but on legal conviction.
 94-4802. Public offenses, how prosecuted.
 94-4803. Criminal action defined.
 94-4804. Parties to a criminal action.
 94-4805. The party prosecuted known as defendant.
 94-4806. Rights of defendant in a criminal action.
 94-4807. Second prosecution for the same offense prohibited.
 94-4808. No person to be a witness against himself in a criminal action or to be unnecessarily restrained.
 94-4809. No person to be convicted but upon verdict or judgment.

94-4801. (11606) **No person punishable but on legal conviction.** No person can be punished for a public offense, except upon a legal conviction in a court having jurisdiction thereof.

History: En. Sec. 1350, Pen. C. 1895; re-en. Sec. 8910, Rev. C. 1907; re-en. Sec. 11606, R. C. M. 1921. Cal. Pen. C. Sec. 681.

References

Grady v. City of Livingston et al., 115 M 47, 61, 141 P 2d 346.

Criminal Law 83.

22 C.J.S. Criminal Law § 107.

94-4802. (11607) Public offenses, how prosecuted. Every public offense must be prosecuted by indictment or information, except—

1. Where proceedings are had for the removal of civil officers of the state;
2. Offenses arising in the militia when in actual service and in the land and naval forces in time of war, or which the state may keep, with the consent of congress, in time of peace;
3. Offenses tried in justices' and police courts.

History: En. Sec. 1351, Pen. C. 1895; re-en. Sec. 8911, Rev. C. 1907; re-en. Sec. 11607, R. C. M. 1921. Cal. Pen. C. Sec. 682.

References

State v. District Court, 61 M 558, 562, 202 P 756; State ex rel. Marquette v. Police Court, 86 M 297, 310, 283 P 430.

Indictment and Information 3.

42 C.J.S. Indictments and Informations § 9.

94-4803. (11608) Criminal action defined. The proceeding by which a party charged with a public offense is accused and brought to trial and punishment is known as a criminal action.

History: En. Sec. 1, p. 189, Cod. Stat. 1871; re-en. Sec. 1, 3d Div. Rev. Stat. 1879; re-en. Sec. 1, 3d Div. Comp. Stat. 1887; amd. Sec. 1352, Pen. C. 1895; re-en. Sec. 8912, Rev. C. 1907; re-en. Sec. 11608, R. C. M. 1921. Cal. Pen. C. Sec. 683.

References

State v. Lewis, 67 M 447, 451, 216 P 337; State ex rel. Stewart v. District Court, 77 M 361, 372, 251 P 137.

Action 18.

1 C.J.S. Actions § 43.

94-4804. (11609) Parties to a criminal action. A criminal action is prosecuted in the name of the state of Montana as a party, against the person charged with the offense.

History: Earlier acts are Sec. 2, p. 189, Cod. Stat. 1871; re-en. Sec. 2, 3d Div. Rev. Stat. 1879; re-en. Sec. 2, 3d Div. Comp. Stat. 1887.

This section en. Sec. 1353, Pen. C. 1895; re-en. Sec. 8913, Rev. C. 1907; re-en. Sec.

11609, R. C. M. 1921. Cal. Pen. C. Sec. 684.

Indictment and Information 26.

42 C.J.S. Indictments and Informations § 41.

94-4805. (11610) The party prosecuted known as defendant. The party prosecuted in a criminal action is designated in this code as the defendant.

History: En. Sec. 1354, Pen. C. 1895; re-en. Sec. 8914, Rev. C. 1907; re-en. Sec.

11610, R. C. M. 1921. Cal. Pen. C. Sec. 685.

94-4806. (11611) Rights of defendant in a criminal action. In all criminal prosecutions the accused shall have the right—

1. To appear and defend in person and by counsel;
2. To demand the nature and cause of the action;
3. To meet the witnesses against him face to face;
4. To have process to compel the attendance of witnesses in his behalf;
5. A speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right

of the state to have a change of venue for any of the causes for which the defendant may obtain the same.

History: Earlier acts are Sec. 9, p. 190, Cod. Stat. 1871; re-en. Sec. 9, 3d Div. Rev. Stat. 1879; re-en. Sec. 9, 3d Div. Comp. Stat. 1887.

This section en. Sec. 1355, Pen. C. 1895; re-en. Sec. 8915, Rev. C. 1907; re-en. Sec. 11611, R. C. M. 1921. Cal. Pen. C. Sec. 686.

Operation and Effect

Under a statute providing that the accused, in a criminal prosecution, is entitled to meet the witnesses against him face to face, it is error where the prosecuting witness was not within the state, to admit in evidence the committing magistrate's general recollection of the testimony which such witness gave at the preliminary examination. *State v. Lee*, 13 M 248, 249, 33 P 690. See also *State v. Byers*, 16 M 565, 569, 41 P 708; *State v. Vanella*, 40 M 326, 336, 106 P 364.

At the date of the adoption of the constitution, in 1889, while the right to a trial by jury existed by virtue of the territorial statutes in all cases of felonies and misdemeanors, it did not exist under the provisions of the statutes in force for the prevention of public offenses, and there has not been any change in this respect. *State ex rel. Jackson v. Kennie*, 24 M 45, 57, 60 P 589.

Criminal Law—573, 635, 641 (1), 662 (1); Indictment and Information—56; Jury—21 (1); Witnesses—2 (1-4).

22 C.J.S. Criminal Law § 466; 23 C.J.S. Criminal Law §§ 963, 979, 981, 1006, 1008; 42 C.J.S. Indictments and Informations § 90; 50 C.J.S. Juries §§ 48, 76; 70 C.J. Witnesses § 5 et seq.

14 Am. Jur. 847, Criminal Law, §§ 118 et seq.

Finger prints as evidence. 16 ALR 370 and 63 ALR 1324.

Use in criminal case of testimony given on former trial, or preliminary examination, by witness not available at present trial. 15 ALR 495; 79 ALR 1392 and 122 ALR 425.

Right of defendant in criminal case to conduct defense in person. 17 ALR 266.

Effect of, and remedy for, infringement of right of accused to communicate with his attorney. 23 ALR 1382 and 54 ALR 1225.

Presence of accused during view by jury. 30 ALR 1357 and 90 ALR 597.

Right of defendant in a criminal case to cross-examine a codefendant who has taken the stand in his own behalf. 33 ALR 826.

Constitutional guaranty of right to appear by counsel as applicable to misdemeanor case. 42 ALR 1157.

Remedy for delay in bringing accused to trial or to retrial after reversal. 58 ALR 1510.

Right to take finger prints and photographs of accused before trial, or to retain same in police record after acquittal or discharge of accused. 83 ALR 127.

Brevity of time between assignment of counsel and trial as affecting question whether accused is denied right to assistance of counsel. 84 ALR 544.

Constitutionality of statute permitting state to take or use in evidence depositions in criminal case. 90 ALR 377.

Brief voluntary absence of defendant from court room during trial of criminal case as ground of error. 100 ALR 478.

Constitutional or statutory right of accused to speedy trial as affected by his incarceration for another offense. 118 ALR 1037.

Waiver or loss of defendant's right to speedy trial in criminal case. 129 ALR 572.

Right of accused to have evidence interpreted to him. 140 ALR 766.

Relief in habeas corpus for violation of accused's right to assistance of counsel. 146 ALR 369.

Duty of court when appointing counsel for defendant to name attorney other than one employed by, or appointed for, a codefendant. 148 ALR 183.

Plea of guilty without advice of counsel. 149 ALR 1403.

Privilege against self-incrimination as available to member or officer of unincorporated association as regards its books or papers. 152 ALR 1208.

Privilege against self-incrimination as applicable to testimony that one has been compelled to give in another jurisdiction. 154 ALR 994.

Exclusion of public during criminal trial. 156 ALR 265.

Right of defendant in criminal case to discharge of, or substitution of other counsel for, attorney appointed by court to represent him. 157 ALR 1225.

94-4807. (11612) Second prosecution for the same offense prohibited. No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted.

History: En. Sec. 10, p. 190, Cod. Stat. 1871; re-en. Sec. 10, 3d Div. Rev. Stat. 1879; re-en. Sec. 10, 3d Div. Comp. Stat. 1887; amd. Sec. 1356, Pen. C. 1895; re-en. Sec. 8916, Rev. C. 1907; re-en. Sec. 11612, R. C. M. 1921. Cal. Pen. C. Sec. 687.

Operation and Effect

Where a person charged with crime, after a trial, is neither convicted nor acquitted, but, owing to a mistrial, the jury is discharged and the trial ended, he may again be put upon trial for the same offense, and the defense of once in jeopardy will not lie. *State v. Keerl*, 33 M 501, 511, 85 P 862.

Id. After a verdict on a judgment of conviction or acquittal, the defendant in a criminal case has been in jeopardy and may not be tried again for the same offense, except where a new trial has been granted or ordered.

Criminal Law 161 et seq.

22 C.J.S. Criminal Law § 238 et seq.

Conviction or acquittal of robbery as bar to subsequent prosecution for murder done in the perpetration of the robbery. 4 ALR 702.

Conviction or acquittal of larceny as bar to prosecution for burglary. 19 ALR 626.

94-4808. (11613) No person to be a witness against himself in a criminal action or to be unnecessarily restrained. No person can be compelled, in a criminal action, to be a witness against himself; nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge.

History: En. Secs. 11, 12, p. 190, Cod. Stat. 1871; re-en. Secs. 11, 12, 3d Div. Rev. Stat. 1879; re-en. Secs. 11, 12, 3d Div. Comp. Stat. 1887; re-en. Sec. 1357, Pen. C. 1895; re-en. Sec. 8917, Rev. C. 1907; re-en. Sec. 11613, R. C. M. 1921. Cal. Pen. C. Sec. 688.

Criminal Law 393 (1), 637; Witnesses 300.

22 C.J.S. Criminal Law §§ 654-656; 23 C.J.S. Criminal Law § 977.

94-4809. (11614) No person to be convicted but upon verdict or judgment. No person can be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon a judgment of a court, a jury having been waived, in a criminal case not amounting to felony.

History: En. Sec. 1358, Pen. C. 1895; re-en. Sec. 8918, Rev. C. 1907; re-en. Sec. 11614, R. C. M. 1921. Cal. Pen. C. Sec. 689.

Jury 21-24.

50 C.J.S. Juries § 75 et seq.

Conviction or acquittal upon charge of murder of one person as bar to prosecution for like offense against another person at the same time. 20 ALR 341.

Conviction or acquittal in one district as bar to prosecution in another, based on continuous transportation of intoxicating liquor. 24 ALR 1125.

Acquittal as bar to a prosecution of accused for perjury committed at trial. 37 ALR 1290.

Acquittal or conviction of assault and battery as bar to prosecution for rape, or assault with intent to commit rape, based on same transactions. 78 ALR 1213.

Conviction or acquittal under charge of assault with intent to rob as bar to prosecution for assault with intent to kill based on same transaction or on closely connected transactions. 81 ALR 701.

Conviction or acquittal on charge which includes element of illicit sexual intercourse as bar to prosecution for adultery. 94 ALR 405.

Conviction or acquittal on charge of assault on one person as bar to prosecution for assault against another person at the same time. 113 ALR 222.

Double jeopardy where jury is discharged before termination of trial because of illness of accused. 159 ALR 750.

14 Am. Jur. 869, Criminal Law, §§ 144 et seq.

Privilege against self incrimination as available to member or officer of unincorporated association as regards its books or papers. 152 ALR 1208.

Privilege against self incrimination as applicable to testimony that one has been compelled to give in another jurisdiction. 154 ALR 994.

Duty of court as to admonishing defendant of consequences of plea of guilty. 110 ALR 228.

Plea of guilty as affected by objection that it was not made by defendant personally. 110 ALR 1300.

CHAPTER 49

DEFINITIONS—PROSECUTION OF CRIMINAL ACTIONS—
JURISDICTION OF COURTS

Section	94-4901.	Complaint.
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	94-4909.	Prosecutions by information.
	94-4910.	Leave to file information.
	94-4911.	Order of court granting.
	94-4912.	County attorney to file information.
	94-4913.	Order entered in minutes of court.
	94-4914.	Officers not to disclose.
	94-4915.	Prosecutions by indictment, when.
	94-4916.	Jurisdiction of justices of the peace.
	94-4917.	Jurisdiction of district court.

94-4901. (11615) Complaint. A complaint is a statement in writing, made to a court or magistrate, that a person has been guilty of some designated offense.

History: En. Sec. 1370, Pen. C. 1895; Criminal Law⌚209.
re-en. Sec. 8919, Rev. C. 1907; re-en. Sec. 22 C.J.S. Criminal Law § 306.
11615, R. C. M. 1921. Cal. Pen. C. Sec.
806.

94-4902. (11616) Indictment. An indictment is an accusation in writing, presented by a grand jury to a competent court, charging a person with a public offense.

History: En. Sec. 1371, Pen. C. 1895; Code, in State ex rel. Nolan v. Brantly, 20
re-en. Sec. 8920, Rev. C. 1907; re-en. Sec. M 173, 178, 50 P 410.
11616, R. C. M. 1921. Cal. Pen. C. Sec.
917.

References

Cited or applied as section 1371, Penal §§ 7, 35, 110.

Indictment and Information⌚17.

42 C.J.S. Indictments and Informations

94-4903. (11617) Information. An information is an accusation in writing, in form and substance like an indictment for the same offense, charging a person with a public offense, presented and signed by the county attorney and filed in the office of the clerk of the district court.

History: En. Sec. 1372, Pen. C. 1895;
re-en. Sec. 8921, Rev. C. 1907; re-en. Sec.
11617, R. C. M. 1921.

Operation and Effect

The fact that an information is not verified does not deprive the court of jurisdiction to try the case. State ex rel. Nolan v. Brantly, 20 M 173, 178, 50 P 410.

References

State v. Vuckovich, 61 M 480, 491, 203 P 491; State v. Johnson et al., 69 M 38, 43, 220 P 82; State ex rel. Juhl v. District Court, 107 M 309, 314, 84 P 2d 979.

Indictment and Information⌚35.

42 C.J.S. Indictments and Informations
§ 11.

94-4904. (11618) Magistrate. A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense.

History: En. Sec. 1373, Pen. C. 1895;
re-en. Sec. 8922, Rev. C. 1907; re-en. Sec.
11618, R. C. M. 1921. Cal. Pen. C. Sec.
807.

Cross-Reference

Magistrate defined, sec. 19-103.

Operation and Effect

Held, that a proceeding looking to the

imposition of a fine for the violation of a city ordinance is one for a "public offense" within the meaning of this section giving the police magistrate power to issue a warrant for the arrest of a person charged with a public offense, and of section 94-100-1, providing the procedure in an action before the police court for

a public offense, justifying the issuance of a warrant of arrest under section 94-100-2. State ex rel. Marquette v. Police Court, 86 M 297, 309, 283 P 430.

Criminal Law 207 (1).

22 C.J.S. Criminal Law §§ 306, 334.

94-4905. (11619) Who are magistrates. The following persons are magistrates:

1. The justices of the supreme court.
2. The judges of the district court.
3. Justices of the peace.
4. Police magistrates in towns or cities.

History: En. Sec. 1374, Pen. C. 1895; re-en. Sec. 8923, Rev. C. 1907; re-en. Sec. 11619, R. C. M. 1921. Cal. Pen. C. Sec. 808.

References

State v. Johnson et al., 69 M 38, 44, 220 P 82.

94-4906. (11620) Peace officer. A peace officer is a sheriff of a county, or his deputy, or a constable, marshal or policeman of a township, city or town.

History: En. Sec. 1375, Pen. C. 1895; re-en. Sec. 8924, Rev. C. 1907; re-en. Sec. 11620, R. C. M. 1921. Cal. Pen. C. Sec. 817.

References

Cited or applied as section 8924, Revised Codes, in State ex rel. Quintin v. Edwards, 38 M 250, 265, 99 P 940.

Officers 1.

46 C.J. Officers § 2.

94-4907. (11621) Criminal actions in justice court. All criminal actions in courts of justices of the peace and police courts must be prosecuted by complaint.

History: En. Sec. 1380, Pen. C. 1895; re-en. Sec. 8925, Rev. C. 1907; re-en. Sec. 11621, R. C. M. 1921.

Criminal Law 252 (1).

22 C.J.S. Criminal Law § 374.

94-4908. (11622) Criminal actions in district court. All criminal actions in the district court, except those on appeal, must be prosecuted by information or indictment.

History: Ap. p. Sec. 1, p. 248, L. 1891; en. Sec. 1381, Pen. C. 1895; re-en. Sec. 8926, Rev. C. 1907; re-en. Sec. 11622, R. C. M. 1921.

References

State v. Johnson et al., 69 M 38, 43, 220 P 82.

Indictment and Information 1.

42 C.J.S. Indictments and Informations §§ 1, 4, 15.

94-4909. (11623) Prosecutions by information. Prosecutions in the district court must be by information:

1. In all cases where there has been an examination and commitment or admission to bail by a magistrate on a charge of crime; or,
2. In any case where there has been no examination or commitment or admission to bail, upon leave granted by the court for that purpose.

History: En. Sec. 1382, Pen. C. 1895; re-en. Sec. 8927, Rev. C. 1907; re-en. Sec. 11623, R. C. M. 1921.

Operation and Effect

Prosecutions in the district court may be either by information, in cases where there

has been an examination and commitment or admission to bail by magistrate, in which case an order of the court is not necessary; or by information filed by order of the court upon the written motion of the county attorney, which may be done without such examination. *State v. Bowser*, 21 M 133, 134, 53 P 179. See *State v. Vinn*, 50 M 27, 32, 144 P 773.

Where the information is filed by leave of court, it need not be entered in writing before the filing of the information; but, after the arrest of the defendant, the minutes of the court may be corrected so as

to amend the order. *State v. Bowser*, 21 M 133, 137, 53 P 179.

References

Cited or applied as section 8927, Revised Codes, in *State v. Byrd*, 41 M 585, 590, 111 P 407.

Indictment and Information

42 C.J.S. Indictments and Informations §§ 5, 7, 8, 12-14, 16.

27 Am. Jur. 579, Indictments and Informations

94-4910. (11624) Leave to file information. Application for leave to file an information before an examination, commitment, or admission to bail must be made to the court on written motion by the county attorney.

History: En. Sec. 1383, Pen. C. 1895; re-en. Sec. 8928, Rev. C. 1907; re-en. Sec. 11624, R. C. M. 1921.

Operation and Effect

A warrant may issue on an information filed by the county attorney by leave of court on a motion in writing not verified, and the information verified only on information and belief. *State v. Shafer*, 26 M 11, 15, 66 P 463.

Under this section and the next preceding section, it is only where there has been no examination or commitment by a magistrate that the county attorney must move for leave to file an information. *State v. Byrd*, 41 M 585, 591, 111 P 407.

The district court may grant leave to file an information without previous examination of defendant by a committing magistrate. *State v. Vuckovich*, 61 M 480, 491, 203 P 491.

Where a deputy county attorney appeared in open court and orally moved for leave to file an information presenting at the same time a written request signed by the county attorney which was filed immediately upon granting of the request, the court properly overruled defendant's motion to quash the information based upon the ground that leave to file had been granted on oral request, contrary to this section. *State v. Kacar*, 74 M 269, 273, 240 P 365.

94-4911. (11625) Order of court granting. The court by an order may grant such leave, or may require an examination before a magistrate, or may, upon affidavits filed by any person, order the county attorney to file an information against the persons charged with a public offense.

History: En. Sec. 1384, Pen. C. 1895; re-en. Sec. 8929, Rev. C. 1907; re-en. Sec. 11625, R. C. M. 1921.

References

Cited or applied as section 1384, Penal Code, in *In re Weed*, 26 M 241, 251, 67 P 308; *State v. Vuckovich*, 61 M 480, 491, 203 P 491; *State ex rel. Juhl v. District Court*, 107 M 309, 313, 84 P 2d 979.

94-4912. (11626) County attorney to file information. If leave is granted, the county attorney may at any time thereafter file an information against the person named in the order granting leave to file the same, and thereupon the defendant named in the information must be arrested, as upon the finding of an indictment.

History: En. Sec. 1385, Pen. C. 1895; re-en. Sec. 8930, Rev. C. 1907; re-en. Sec. 11626, R. C. M. 1921.

Criminal Law 216; Indictment and Information 39.
22 C.J.S. Criminal Law § 316; 42 C.J.S. Indictments and Informations §§ 67, 70-72.

94-4913. (11627) Order entered in minutes of court. After the arrest of such defendant the clerk must immediately enter the order granting leave to file the information in the minutes of the court.

History: En. Sec. 1386, Pen. C. 1895; re-en. Sec. 8931, Rev. C. 1907; re-en. Sec. 11627, R. C. M. 1921.

References

Cited or applied as section 1386, Penal Code, in *State v. Bowser*, 21 M 133, 138, 53 P 179.

94-4914. (11628) Officers not to disclose. The fact that such leave has been granted, or that an information has been filed, must not be disclosed until after the defendant has been arrested.

History: En. Sec. 1387, Pen. C. 1895; re-en. Sec. 8932, Rev. C. 1907; re-en. Sec. 11628, R. C. M. 1921.

the court therefore made granting leave to file the information. *State v. Bowser*, 21 M 133, 138, 53 P 179.

Operation and Effect

The law forbids, not only the disclosure of the fact that an information has been filed, but even the fact that leave to file has been granted by the court, until after arrest, and also contemplates that, if the defendant is at large, the minutes of the court shall be silent as to the order of

References

Cited or applied as section 1387, Penal Code, in *State v. Shafer*, 26 M 11, 15, 66 P 463.

Indictment and Information 3.
42 C.J.S. Indictments and Informations § 9.

✓ **94-4915. (11629) Prosecutions by indictment, when.** Prosecutions in the district court must be by indictment in all cases where there has been no examination, commitment, or admission to bail by a magistrate, except in the cases where the court grants leave to prosecute by information before an examination and commitment by a magistrate.

History: En. Sec. 1388, Pen. C. 1895; re-en. Sec. 8933, Rev. C. 1907; re-en. Sec. 11629, R. C. M. 1921.

94-4916. (11630) Jurisdiction of justices of the peace. The justices' courts shall have jurisdiction of the following public offenses, committed within their respective counties, in which such courts are established:

1. Petit larceny.
2. Assault in the third degree, as specified in section 94-1307 of this code.
3. Breaches of the peace, riots, routs, affrays, committing a wilful injury to property, and all misdemeanors punishable by a fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or both such fine and imprisonment.

And to act as examining and committing magistrates, as provided in this code.

History: En. Sec. 1400, Pen. C. 1895; re-en. Sec. 8934, Rev. C. 1907; re-en. Sec. 11630, R. C. M. 1921. Cal. Pen. C. Sec. 1425.

Exclusive Jurisdiction

This statute, together with the provisions of article VIII, sections 11 and 21 of the constitution, under authority of which it was enacted, apparently reposes in justice courts exclusive original jurisdiction of all misdemeanors unless a law specifically provides that the district court shall have jurisdiction or fixes the penalty above the justice court maximum. *Ex parte Sheehan*, 100 M 244, 251, 49 P 2d 438.

Operation and Effect

In a prosecution for maintaining a common nuisance under section 19, Chapter 9, Extraordinary Session of 1921 (since repealed), made supplemental to and a part of the laws relating to intoxicating liquors, held that the district court had original jurisdiction, under section 37 of the Enforcement Act (Chapter 143, Laws 1917) (since repealed), conferring upon the district court original jurisdiction for violations of liquor laws and continued in force by Chapter 9, notwithstanding the offense is made a misdemeanor by section 19

thereof, punishable by a fine not exceeding \$500 and imprisonment in the county jail for not exceeding six months, and therefore otherwise triable in a justice court under this section. *State v. Bowker*, 63 M 1, 4, 205 P 961; *State v. Sorenson*, 65 M 65, 69, 210 P 752.

References

Cited or applied as section 1400, Penal Code, in *State ex rel. Jackson v. Kennie*, 24 M 45, 56, 60 P 589; *Hassan v. Earll*, 61 M 389, 392, 202 P 581; *State v. Benson*, 91 M 109, 112, 5 P 2d 1045; *State v. Wiles*, 98 M 577, 41 P 2d 8; *State ex rel. Freebourn v. District Court*, 105 M 77, 79, 69 P 2d 748.

Criminal Law \S 90 (2).

22 C.J.S. Criminal Law \S 125.

31 Am. Jur. 739, Justices of the Peace, \S 54, 55.

Justice of the peace as a person in authority within rule excluding confession made under promise of immunity by person in authority 7 ALR 431.

94-4917. (11631) Jurisdiction of district court. The district court has jurisdiction of all public offenses not otherwise provided for.

History: En. Sec. 1401, Pen. C. 1895; re-en. Sec. 8935, Rev. C. 1907; re-en. Sec. 11631, R. C. M. 1921.

References

State v. Wiles, 98 M 577, 41 P 2d 8.

Criminal Law \S 86.

22 C.J.S. Criminal Law \S 122.

14 Am. Jur. 917, Criminal Law, \S 214 et seq.

Power of trial court or judge to revoke order granting new trial in criminal case. 145 ALR 400.

CHAPTER 50

LAWFUL RESISTANCE—INTERVENTION OF OFFICERS OF JUSTICE

- Section 94-5001. Lawful resistance, by whom made.
 94-5002. By the party, in what cases and to what extent.
 94-5003. By other parties, in what cases.
 94-5004. Intervention of officers, in what cases.
 94-5005. Persons acting in their aid justified.

94-5001. (11632) Lawful resistance, by whom made. Lawful resistance to the commission of a public offense may be made—

1. By the party about to be injured;
2. By other parties.

History: En. Sec. 1410, Pen. C. 1895; re-en. Sec. 8936, Rev. C. 1907; re-en. Sec. 11632, R. C. M. 1921. Cal. Pen. C. Sec. 692.

Homicide \S 107.

40 C.J.S. Homicide \S 101.

94-5002. (11633) By the party, in what cases and to what extent. Resistance sufficient to prevent the offense may be made by the party about to be injured—

1. To prevent an offense against his person, or his family, or some member thereof;

2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

History: Ap. p. Sec. 13, p. 191, Cod. Stat. 1871; re-en. Sec. 13, 3d Div. Rev. Stat. 1879; re-en. Sec. 13, 3d Div. Comp. Stat. 1887; en. Sec. 1411, Pen. C. 1895; re-en. Sec. 8937, Rev. C. 1907; re-en. Sec. 11633, R. C. M. 1921. Cal. Pen. C. Sec. 693.

Assault and Battery—13-15, 67-69; Homicide—107 et seq.
6 C.J.S. Assault and Battery §§ 18-20, 92-94; 40 C.J.S. Homicide § 101 et seq.

94-5003. (11634) By other parties, in what cases. Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense.

History: Ap. p. Sec. 13, p. 191, Cod. Stat. 1871; re-en. Sec. 13, 3d Div. Rev. Stat. 1879; re-en. Sec. 13, 3d Div. Comp. Stat. 1887; en. Sec. 1412, Pen. C. 1895;

re-en. Sec. 8938, Rev. C. 1907; re-en. Sec. 11634, R. C. M. 1921. Cal. Pen. C. Sec. 694.

94-5004. (11635) Intervention of officers, in what cases. Public offenses may be prevented by the intervention of the officers of justice—

1. By requiring security to keep the peace;
2. By forming a police in cities and towns, and by requiring their attendance in exposed places;
3. By suppressing riots.

History: En. Sec. 1420, Pen. C. 1895; re-en. Sec. 8939, Rev. C. 1907; re-en. Sec. 11635, R. C. M. 1921. Cal. Pen. C. Sec. 697.

Breach of the Peace—16; Municipal Corporations—180 (1); Riot—9.
11 C.J.S. Breach of the Peace § 17; 43 C.J. Municipal Corporations § 1293 et seq.; 54 C.J. Riot § 42.

References

Cited or applied as section 8939, Revised Codes, in State ex rel. Quintin v. Edwards, 38 M 250, 265, 99 P 940.

94-5005. (11636) Persons acting in their aid justified. When the officers of justice are authorized to act in the prevention of public offenses, other persons, who, by their command, act in their aid, are justified in so doing.

History: En. Sec. 1421, Pen. C. 1895; re-en. Sec. 8940, Rev. C. 1907; re-en. Sec. 11636, R. C. M. 1921. Cal. Pen. C. Sec. 698.

Sheriffs and Constables—27.
57 C.J. Sheriffs and Constables § 123.

CHAPTER 51

SECURITY TO KEEP THE PEACE

Section 94-5101.	Information of threatened offense.
94-5102.	Examination of complainant and witnesses.
94-5103.	Warrant of arrest.
94-5104.	Proceedings on charge being controverted.
94-5105.	Person complained of, when to be discharged.
94-5106.	Security to keep the peace, when required.
94-5107.	Effect of giving or refusing to give security.
94-5108.	Person committed for not giving security.
94-5109.	Undertaking to be filed in clerk's office.
94-5110.	Security required for assault committed in court.
94-5111.	Undertaking, when broken.
94-5112.	Undertaking, when and how to be prosecuted.
94-5113.	Evidence of breach.

- 94-5114. Costs taxed against complainant.
 94-5115. Appeal by complainant.
 94-5116. Security for the peace.

94-5101. (11637) Information of threatened offense. A complaint may be laid before any of the magistrates mentioned in section 94-4905, that a person has threatened to commit an offense against the person or property of another.

History: Earlier acts relating to giving security to keep the peace were Secs. 1-11, pp. 218-220, Bannack Stat.; re-en. Secs. 20-29, pp. 192-193, Cod. Stat. 1871; re-en. Secs. 20-29, 3d Div. Rev. Stat. 1879; re-en. Secs. 20-29, 3d Div. Comp. Stat. 1887.

This section en. Sec. 1430, Pen. C. 1895; re-en. Sec. 8941, Rev. C. 1907; re-en. Sec. 11637, R. C. M. 1921. Cal. Pen. C. Sec. 701.

compel him to give security to keep the peace. State ex rel. Jackson v. Kennie, 24 M 45, 56, 60 P 589.

The fact that the defendant, in a prosecution for murder, had the deceased arrested and confined in peace proceedings, does not supply any motive for the murder; on the contrary, it tends to show the absence of motive. State v. Suitor, 43 M 31, 45, 114 P 112.

Operation and Effect

The person complained of is not entitled to a jury trial in a proceeding to

Breach of the Peace²⁰.

11 C.J.S. Breach of the Peace § 22.

94-5102. (11638) Examination of complainant and witnesses. When the complaint is laid before such magistrate, he must examine on oath the complainant, and any witness he may produce, and must take their testimony in writing, and cause them to subscribe the same.

History: En. Sec. 1431, Pen. C. 1895; 11638, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8942, Rev. C. 1907; re-en. Sec. 702.

94-5103. (11639) Warrant of arrest. If it appears upon such examination that there is just reason to fear the commission of the offense threatened, by the person so complained of, the magistrate must issue a warrant, directed generally to the sheriff of the county, or any constable, marshal, or policeman in the state, reciting the substance of the complaint, and commanding the officer forthwith to arrest the person complained of and bring him before the magistrate.

History: En. Sec. 1432, Pen. C. 1895; 11639, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8943, Rev. C. 1907; re-en. Sec. 703.

94-5104. (11640) Proceedings on charge being controverted. When the person complained of is brought before the magistrate, if the charge be controverted, the magistrate must take testimony in relation thereto. The evidence must be reduced to writing, and subscribed by the witnesses.

History: En. Sec. 1433, Pen. C. 1895; 11640, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8944, Rev. C. 1907; re-en. Sec. 704.

94-5105. (11641) Person complained of, when to be discharged. If it appears that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged.

History: En. Sec. 1434, Pen. C. 1895; re-en. Sec. 8945, Rev. C. 1907; re-en. Sec. 11641, R. C. M. 1921. Cal. Pen. C. Sec. 705.

References

Cited or applied as section 1434, Penal Code, in State ex rel. Jackson v. Kennie, 24 M 45, 54, 60 P 589.

94-5106. (11642) Security to keep the peace, when required. If, however, there is just reason to fear the commission of the offense, the person

complained of may be required to enter into an undertaking in such sum, not exceeding five thousand dollars, as the magistrate may direct, with one or more sufficient sureties, to keep the peace toward the state, and particularly toward the complainant. The undertaking is valid and binding for one year, and may, upon the renewal of the complaint, be extended for a longer period, or a new undertaking may be required.

History: En. Sec. 1435, Pen. C. 1895; re-en. Sec. 8946, Rev. C. 1907; re-en. Sec. 11642, R. C. M. 1921. Cal. Pen. C. Sec. 706.

References

Cited or applied as section 1435, Penal Code, in *State ex rel. Jackson v. Kennie*, 24 M 45, 54, 60 P 589; *Folsom v. Fisco et al.*, 62 M 194, 198, 204 P 367.

Breach of the Peace—17.

11 C.J.S. Breach of the Peace § 21.

See generally, 8 Am. Jur. 842, Breach of Peace, §§ 19 et seq.

Reasonableness of amount required for bond to keep peace. 93 ALR 304.

94-5107. (11643) Effect of giving or refusing to give security. If the undertaking required by the last section is given, the party complained of must be discharged. If he does not give it, the magistrate must commit him to prison, specifying in the warrant the cause of commitment, the requirement to give security, the amount thereof, and the omission to give the same.

History: En. Sec. 1436, Pen. C. 1895; re-en. Sec. 8947, Rev. C. 1907; re-en. Sec. 11643, R. C. M. 1921. Cal. Pen. C. Sec. 707.

Operation and Effect

An order of commitment is not insufficient because it does not fix the term of the imprisonment. *State ex rel. Jackson v. Kennie*, 24 M 45, 55, 60 P 589.

Held, under this section, declaring that an order of a justice of the peace com-

mitting one to jail for failure to give bond to keep the peace must specify the cause of commitment, the requirement to give security, the amount thereof and the omission to give it, that a commitment which failed to state that the accused had not given security, and which was not directed to the sheriff and did not contain any direction as to what he should do under it was so defective as to afford the sheriff no protection in an action for damages for false imprisonment. *Folsom v. Fisco et al.*, 62 M 194, 198, 204 P 367.

94-5108. (11644) Person committed for not giving security. If the person complained of is committed for not giving the undertaking required, he may be discharged by any magistrate, upon giving the same.

History: En. Sec. 1437, Pen. C. 1895; re-en. Sec. 8948, Rev. C. 1907; re-en. Sec. 11644, R. C. M. 1921. Cal. Pen. C. Sec. 708.

94-5109. (11645) Undertaking to be filed in clerk's office. The undertaking must be filed by the magistrate in the office of the clerk of the district court.

History: En. Sec. 1438, Pen. C. 1895; re-en. Sec. 8949, Rev. C. 1907; re-en. Sec. 11645, R. C. M. 1921. Cal. Pen. C. Sec. 709.

94-5110. (11646) Security required for assault committed in court. A person who, in the presence of a court or magistrate, assaults or threatens to assault another, or to commit an offense against his person or property, or who contends with another with angry words, may be ordered by the court or magistrate to give security, as in this chapter provided, and if he refuse so to do, may be committed as provided in section 94-5107.

History: En. Sec. 1439, Pen. C. 1895; re-en. Sec. 8950, Rev. C. 1907; re-en. Sec. 11646, R. C. M. 1921. Cal. Pen. C. Sec. 710.

Breach of the Peace—17.

11 C.J.S. Breach of the Peace § 18.

94-5111. (11647) Undertaking, when broken. Upon the conviction of the person complained against of a breach of the peace, the undertaking is broken.

History: En. Sec. 1440, Pen. C. 1895;
re-en. Sec. 8951, Rev. C. 1907; re-en. Sec.
11647, R. C. M. 1921. Cal. Pen. C. Sec.
711.

Breach of the Peace—22.
11 C.J.S. Breach of the Peace § 26.
8 Am. Jur. 843, Breach of Peace, § 24.
What constitutes breach of peace bond.
54 ALR 388.

94-5112. (11648) Undertaking, when and how to be prosecuted. Upon the county attorney's producing evidence of such conviction to the district court of the county, the court must order the undertaking to be prosecuted, and the county attorney must thereupon commence an action upon it in the name of the state.

History: En. Sec. 1441, Pen. C. 1895; 11648, R. C. M. 1921. Cal. Pen. C. Sec.
re-en. Sec. 8952, Rev. C. 1907; re-en. Sec. 712.

94-5113. (11649) Evidence of breach. In the action, the offense stated in the record of conviction must be alleged as a breach of the undertaking, and such record is conclusive evidence of the breach.

History: En. Sec. 1442, Pen. C. 1895; 11649, R. C. M. 1921. Cal. Pen. C. Sec.
re-en. Sec. 8953, Rev. C. 1907; re-en. Sec. 713.

94-5114. (11650) Costs taxed against complainant. When any person complained of is discharged by the magistrate, if it appears that the prosecution was malicious, or that there were no reasonable grounds for the complaint, it is the duty of the magistrate to adjudge that the complainant pay all costs of the proceedings, and judgment must thereupon be entered against him.

History: En. Sec. 1443, Pen. C. 1895;
re-en. Sec. 8954, Rev. C. 1907; re-en. Sec.
11650, R. C. M. 1921.

94-5115. (11651) Appeal by complainant. A complainant against whom costs are adjudged may appeal from such decision to the district court in the county in which such proceedings were had, upon filing an undertaking as provided for in civil actions.

History: En. Sec. 1444, Pen. C. 1895;
re-en. Sec. 8955, Rev. C. 1907; re-en. Sec.
11651, R. C. M. 1921.

Breach of the Peace—21.
11 C.J.S. Breach of the Peace § 29.

94-5116. (11652) Security for the peace. Security to keep the peace, or be of good behavior, cannot be required except as prescribed in this chapter.

History: En. Sec. 1445, Pen. C. 1895;
re-en. Sec. 8956, Rev. C. 1907; re-en. Sec.
11652, R. C. M. 1921. Cal. Pen. C. Sec.
714.

References
Cited or applied as section 1445, Penal Code, in State ex rel. Jackson v. Kennie,
24 M 45, 54, 60 P 589.

Breach of the Peace—16.
11 C.J.S. Breach of the Peace § 20.

CHAPTER 52

POLICE IN CITIES AND TOWNS AND THEIR ADMITTANCE AT PUBLIC MEETINGS

- Section 94-5201. Organization and regulation of the police.
94-5202. Force to preserve the peace at public meetings.

94-5201. (11653) Organization and regulation of the police. The organization and regulation of the police, in the cities and towns of this state, is governed by special laws and ordinances.

History: En. Sec. 1450, Pen. C. 1895; Municipal Corporations \S 180 (1).
re-en. Sec. 8957, Rev. C. 1907; re-en. Sec. 43 C.J. Municipal Corporations \S 1271
11653, R. C. M. 1921. Cal. Pen. C. Sec. et seq.

94-5202. (11654) Force to preserve the peace at public meetings. The mayor or other officer having the direction of the police of a city or town must order a force, sufficient to preserve the peace, to attend any public meeting, when he is satisfied that a breach of the peace is reasonably apprehended.

History: Ap. p. Sec. 18, p. 192, Cod. 11654, R. C. M. 1921. Cal. Pen. C. Sec. 720.
Stat. 1871; re-en. Sec. 18, 3d Div. Rev.
Stat. 1879; re-en. Sec. 18, 3d Div. Comp.
Stat. 1887; amd. Sec. 1451, Pen. C. 1895; Municipal Corporations \S 189 (1).
re-en. Sec. 8958, Rev. C. 1907; re-en. Sec. 43 C.J. Municipal Corporations \S 1335
et seq.

CHAPTER 53

SUPPRESSION OF RIOTS

- Section 94-5301. Power of the sheriff in overcoming resistance.
94-5302. Officer to certify to court the name of resisters, etc.
94-5303. Governor to order out militia to aid in executing process.
94-5304. Magistrates and officers to command rioters to disperse.
94-5305. To arrest rioters if they do not disperse.
94-5306. Officers who may order out the militia.
94-5307. Commanding officer and troops to obey the order.
94-5308. Armed force to obey orders of whom.
94-5309. Sheriff to have charge of national guard.
94-5310. Conduct of troops.
94-5311. Same.
94-5312. Governor may declare a county in a state of insurrection.
94-5313. May revoke the proclamation.
94-5314. Liability of officers for neglect of duties concerning unlawful or riotous assembly.

94-5301. (11655) Power of the sheriff in overcoming resistance. When a sheriff or other public officer authorized to execute process, finds, or has reason to apprehend, that resistance will be made to the execution of the process, he may command as many male inhabitants of his county as he thinks proper to assist him in overcoming the resistance, and, if necessary, in seizing, arresting, and confining the persons resisting, their aiders and abettors.

History: En. Sec. 19, p. 192, Cod. Stat. 1871; re-en. Sec. 19, 3d Div. Rev. Stat. 1879; re-en. Sec. 19, 3d Div. Comp. Stat. 1887; amd. Sec. 1460, Pen. C. 1895; re-en. Sec. 8959, Rev. C. 1907; re-en. Sec. 11655, R. C. M. 1921. Cal. Pen. C. Sec. 723.

References

Cited and applied as section 1460, Penal Code, in *Sears v. Gallatin County*, 20 M 462, 464, 52 P 204.

Riot \S 9.

54 C.J. Riot \S 42 et seq.
47 Am. Jur. 839, Sheriffs, Police and Constables, \S 26 et seq.

94-5302. (11656) Officer to certify to court the name of resisters, etc. The officer must certify to the court from which the process issued, the

names of the persons resisting, and their aiders and abettors, to the end that they may be proceeded against for their contempt of court.

History: Ap. p. Sec. 19, p. 192, Cod. re-en. Sec. 8960, Rev. C. 1907; re-en. Sec. Stat. 1871; re-en. Sec. 19, 3d Div. Rev. 11656, R. C. M. 1921. Cal. Pen. C. Sec. Stat. 1879; re-en. Sec. 19, 3d Div. Comp. 724.
Stat. 1887; amd. Sec. 1461, Pen. C. 1895;

94-5303. (11657) Governor to order out militia to aid in executing process. If it appears to the governor that the civil power of any county is not sufficient to enable the sheriff to execute process delivered to him, or to quell any unlawful or riotous assembly, he must, upon the application of the sheriff of the county, order such portion as shall be sufficient, or the whole, if necessary, of the organized national guard or enrolled militia of the state, to proceed to the assistance of the sheriff.

History: En. Sec. 1462, Pen. C. 1895; Militia \Rightarrow 15.
re-en. Sec. 8961, Rev. C. 1907; re-en. Sec. 40 C.J. Militia § 70.
11657, R. C. M. 1921.

94-5304. (11658) Magistrates and officers to command rioters to disperse. Where any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies, the officials governing the town or city, or the justices of the peace and constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them in the name of the state immediately to disperse.

History: En. Sec. 16, p. 192, Cod. Stat. 1871; re-en. Sec. 16, 3d Div. Rev. Stat. 1879; re-en. Sec. 16, 3d Div. Comp. Stat. 1887; amd. Sec. 1463, Pen. C. 1895; re-en. Sec. 8962, Rev. C. 1907; re-en. Sec. 11658, R. C. M. 1921. Cal. Pen. C. Sec. 726.

References

Cited or applied as section 8962, Revised Codes, in *State v. Driscoll*, 49 M 558, 565, 144 P 153.

94-5305. (11659) To arrest rioters if they do not disperse. If the persons assembled do not immediately disperse, such magistrates and officers must arrest them, and to that end may command the aid of all persons present or within the county.

History: En. Sec. 1464, Pen. C. 1895; re-en. Sec. 8963, Rev. C. 1907; re-en. Sec. 11659, R. C. M. 1921. Cal. Pen. C. Sec. 727.

References

Cited or applied as section 8963, Revised Codes, in *State v. Driscoll*, 49 M 558, 566, 144 P 153.

94-5306. (11660) Officers who may order out the militia. When there is an unlawful or riotous assembly with the intent to commit a felony, or to offer violence to person or property, or to resist by force the laws of the state or of the United States; and the fact is made known to the governor by any justice of the supreme court, or judge of the district court, or sheriff of the county, or the mayor or marshal of a city, the governor may issue an order directed to the commanding officer of a division or brigade of the organized national guard, or enrolled militia of the state, to order his command, or such part thereof as may be necessary, into active service, and to appear at a time and place therein specified, to aid the civil authorities in suppressing violence and enforcing the laws.

History: En. Sec. 1465, Pen. C. 1895; 11660, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8964, Rev. C. 1907; re-en. Sec. 728.

94-5307. (11661) Commanding officer and troops to obey the order.

The organized national guard or enrolled militia, or such portion thereof as shall be called into active service, as provided in the preceding section, must appear at the time and place appointed, fully armed and equipped.

History: En. Sec. 1466, Pen. C. 1895;
re-en. Sec. 8965, Rev. C. 1907; re-en. Sec.
11661, R. C. M. 1921.

94-5308. (11662) Armed force to obey orders of whom. When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders, and is placed under the temporary direction of any civil officer, as provided in the following section, it must obey the orders in relation thereto of such civil officer.

History: En. Sec. 1467, Pen. C. 1895;
re-en. Sec. 8966, Rev. C. 1907; re-en. Sec.
11662, R. C. M. 1921.

94-5309. (11663) Sheriff to have charge of national guard. Whenever any portion of the national guard or enrolled militia is called into active service to suppress an insurrection or rebellion, to disperse a mob, or to enforce the execution of the laws of this state, or of the United States, it is competent for the commander-in-chief, or for the general acting in his stead, to place such troops under the temporary direction of the sheriff of any county.

History: En. Sec. 1468, Pen. C. 1895;
re-en. Sec. 8967, Rev. C. 1907; re-en. Sec.
11663, R. C. M. 1921.

References

Cited or applied as section 8967, Revised Codes, in *In re McDonald*, 49 M 454, 461, 143 P 947; *McCarthy v. Anaconda Copper Min. Co.*, 70 M 309, 225 P 391.

94-5310. (11664) Conduct of troops. When the commander-in-chief, or general acting in his stead, shall call troops into active service, and shall not place them under the temporary direction of any civil officer, the commanding officer shall use his own discretion with respect to the propriety of attacking or firing upon, any mob or unlawful assembly, but no officer who has been called out to sustain the civil authorities shall, under any pretense, or in compliance with any order, fire blank cartridges upon any mob or unlawful assemblage, under penalty of being cashiered by sentence of a court-martial; provided, that nothing in this chapter shall be construed as prohibiting any such troops from firing or charging upon such mob or assembly, without the order of such civil officer, in case they shall first be attacked or fired upon, or forcibly resisted in discharge of their duties.

History: En. Sec. 1469, Pen. C. 1895;
re-en. Sec. 8968, Rev. C. 1907; re-en. Sec.
11664, R. C. M. 1921.

94-5311. (11665) Same. Every endeavor must be used, both by the magistrates and civil officers, and by the officer commanding the troops, which can be made consistently with the preservation of life, to induce or force the rioters to disperse, before an attack is made upon them by which their lives are endangered.

History: En. Sec. 1470, Pen. C. 1895;
re-en. Sec. 8969, Rev. C. 1907; re-en. Sec.
11665, R. C. M. 1921.

94-5312. (11666) Governor may declare a county in a state of insurrection. When the governor is satisfied that the execution of civil or criminal process has been forcibly resisted in any county by bodies of men, or that combinations to resist the execution of process by force exist in any county, and that the power of the county has been exerted, and has not been sufficient to enable the officers having the process to execute it, he may, on the application of the officer, or of the county attorney, or judge of the district court of the county, by proclamation, published in such papers as he may direct, declare the county to be in a state of insurrection, and may order into the service of the state such number and description of the organized national guard, or volunteer uniformed companies, or other militia of the state, as he deems necessary, to serve for such term and under the command of such officer as he may direct.

History: En. Sec. 1471, Pen. C. 1895; Insurrection and Sedition § 5.
 re-en. Sec. 8970, Rev. C. 1907; re-en. Sec. 46 C.J.S. Insurrection and Sedition § 4.
 11666, R. C. M. 1921.

94-5313. (11667) May revoke the proclamation. The governor may, when he thinks proper, revoke the proclamation authorized by the last section, or declare that it shall cease at the time and in the manner directed by him.

History: En. Sec. 1472, Pen. C. 1895;
 re-en. Sec. 8971, Rev. C. 1907; re-en. Sec.
 11667, R. C. M. 1921.

94-5314. Liability of officers for neglect of duties concerning unlawful or riotous assembly. If the sheriff of a county, the chief of police and/or mayor of a town or city, or the constables of a township, or any of them, having notice of an unlawful or riotous assembly, neglect to proceed to the place of assembly and to exercise the authority with which they are vested for dispersing the same and arresting the offenders, they shall be liable for all damages sustained.

History: En. Sec. 1, Ch. 204, L. 1947.

CHAPTER 54

IMPEACHMENT

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| Section | 94-5401. | Officers liable to impeachment. |
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| | 94-5404. | Articles of impeachment. |
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| | 94-5416. | Effect of judgment of suspension. |
| | 94-5417. | Impeachment disqualifies until acquittal—vacancy, how filled. |
| | 94-5418. | Presiding officer when lieutenant-governor is impeached. |
| | 94-5419. | Impeachment not a bar to indictment. |

94-5401. (11668) Officers liable to impeachment. The governor and other state and judicial officers, except justices of the peace, shall be liable to impeachment for high crimes and misdemeanors, or malfeasance in office.

History: Our present impeachment laws are substantially the same as the territorial acts which provided for trial by the council. See Secs. 41-62, pp. 196-199, *Cod. Stat.* 1871; re-en. as Secs. 41-62, 3rd Div. Rev. Stat. 1879; re-en. as Secs. 41-63, 3rd Div. Comp. Stat. 1887; en. Sec. 1500, *Pen. C.* 1895; re-en. Sec. 8972, *Rev. C.* 1907; re-en. Sec. 11668, *R. C. M.* 1921. *Cal. Pen. C.* Sec. 737.

Operation and Effect

This section having the same language as section 17, article V of the constitution, is given the same construction, and does not include senators within the terms "judicial officers" or "state officers." *State ex rel. Haviland v. Beadle*, 42 M 174, 180, 111 P 720.

Officers—73.

46 C.J. Officers § 192 et seq.

43 Am. Jur. 27, Public Officers, §§ 175-180.

94-5402. (11669) Sole power of impeachment. The sole power of impeachment vests in the house of representatives; the concurrence of a majority of all the members being necessary to the exercise thereof. Impeachment shall be tried by the senate sitting for that purpose, and the senators shall be upon oath or affirmation to do justice according to law and evidence. When the governor or lieutenant-governor is on trial, the chief justice of the supreme court shall preside. No person shall be convicted without a concurrence of two-thirds of the senators elected.

History: *En. Sec.* 1501, *Pen. C.* 1895; re-en. Sec. 8973, *Rev. C.* 1907; re-en. Sec. 11669, *R. C. M.* 1921.

94-5403. (11670) Articles, how prepared—trial by senate. All impeachments must be by resolution adopted, originated in, and conducted by managers elected by the house of representatives, who must prepare articles of impeachment, present them at the bar of the senate, and prosecute the same.

History: *En. Sec.* 1502, *Pen. C.* 1895; 11670, *R. C. M.* 1921. *Cal. Pen. C. Sec.* re-en. Sec. 8974, *Rev. C.* 1907; re-en. Sec. 738.

94-5404. (11671) Articles of impeachment. When an officer is impeached by the house of representatives, the articles of impeachment must be delivered to the president of the senate.

History: *En. Sec.* 1503, *Pen. C.* 1895; 11671, *R. C. M.* 1921. *Cal. Pen. C. Sec.* re-en. Sec. 8975, *Rev. C.* 1907; re-en. Sec. 739.

94-5405. (11672) Time of hearing—service of defendant. The senate must assign a day for the hearing of the impeachment, and inform the house of representatives thereof. The president of the senate must cause a copy of the articles of impeachment, with a notice to appear and answer the same at the time and place appointed, to be served on the defendant not less than ten days before the day fixed for the hearing.

History: *En. Sec.* 1504, *Pen. C.* 1895; 11672, *R. C. M.* 1921. *Cal. Pen. C. Sec.* re-en. Sec. 8976, *Rev. C.* 1907; re-en. Sec. 740.

94-5406. (11673) Service, how made. The service must be made upon the defendant personally, or if he cannot, upon diligent inquiry, be found within the state, the senate, upon proof of that fact, may order publication to be made, in such manner as it may deem proper, of a notice requiring him

to appear at a specified time and place and answer the articles of impeachment.

History: En. Sec. 1505, Pen. C. 1895; 11673, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8977, Rev. C. 1907; re-en. Sec. 741.

94-5407. (11674) Proceedings on failure to appear. If the defendant does not appear, the senate, upon proof of service or publication, as provided in the last two sections, may, of its own motion or for cause shown, assign another day for hearing the impeachment, or may proceed, in the absence of the defendant, to trial and judgment.

History: En. Sec. 1506, Pen. C. 1895; 11674, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8978, Rev. C. 1907; re-en. Sec. 742.

94-5408. (11675) Counsel may be appointed. If the defendant appear, and is unable to procure the assistance of counsel, it is the duty of the president of the senate to appoint some suitable person to assist him in his defense; if the defendant is served by publication and fails to appear, it is the duty of the president of the senate to appoint some person or counsel to appear in his behalf and make defense for him.

History: En. Sec. 1507, Pen. C. 1895; re-en. Sec. 8979, Rev. C. 1907; re-en. Sec. 11675, R. C. M. 1921.

94-5409. (11676) Defendant, after appearance, may answer or demur. When the defendant appears, he may in writing object to the sufficiency of the articles of impeachment, or he may answer the same by an oral plea of not guilty, which plea must be entered upon the journal, and puts in issue every material allegation of the articles of impeachment.

History: En. Sec. 1508, Pen. C. 1895; 11676, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8980, Rev. C. 1907; re-en. Sec. 743.

94-5410. (11677) If demurrer is overruled, defendant must answer. If the objection to the sufficiency of the articles of impeachment is not sustained by a majority of the members of the senate, the defendant must be ordered forthwith to answer the articles of impeachment. If he then pleads guilty, the senate must render judgment of conviction against him. If he plead not guilty or refuses to plead, the senate must, at such time as it may appoint, proceed to try the impeachment.

History: En. Sec. 1509, Pen. C. 1895; 11677, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8981, Rev. C. 1907; re-en. Sec. 744.

94-5411. (11678) Senate to be sworn. At the time and place appointed, and before the senate proceeds to act on the impeachment, the secretary must administer to the president of the senate, and the president of the senate to each of the members of the senate then present, an oath truly and impartially to hear, try, and determine the impeachment; and no member of the senate can act or vote upon the impeachment, or upon any question arising thereon, without having taken such oath.

History: En. Sec. 1510, Pen. C. 1895; 11678, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8982, Rev. C. 1907; re-en. Sec. 745.

94-5412. (11679) Two-thirds necessary to a conviction. The defendant cannot be convicted on impeachment without the concurrence of two-thirds

of the members elected, voting by ayes and noes, and if two-thirds of the members elected do not concur in a conviction, he must be acquitted.

History: En. Sec. 1511, Pen. C. 1895; 11679, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8983, Rev. C. 1907; re-en. Sec. 746.

94-5413. (11680) Judgment on conviction, how pronounced. After conviction, the senate must, at such time as it may appoint, pronounce judgment, in the form of a resolution entered upon the journals of the senate.

History: En. Sec. 1512, Pen. C. 1895; 11680, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8984, Rev. C. 1907; re-en. Sec. 747.

94-5414. (11681) The same. On the adoption of the resolution by a majority of the members present who voted on the question of acquittal or conviction, it becomes the judgment of the senate.

History: En. Sec. 1513, Pen. C. 1895; 11681, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8985, Rev. C. 1907; re-en. Sec. 748.

94-5415. (11682) Nature of the judgment. The judgment may be that the defendant be suspended, or that he be removed from office and disqualified to hold any office of honor, trust, or profit under the state.

History: En. Sec. 1514, Pen. C. 1895; 11682, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8986, Rev. C. 1907; re-en. Sec. 749.

94-5416. (11683) Effect of judgment of suspension. If judgment of suspension is given, the defendant, during the continuance thereof, is disqualified from receiving the salary, fees, or emoluments of the office.

History: En. Sec. 1515, Pen. C. 1895; 11683, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 8987, Rev. C. 1907; re-en. Sec. 750.

94-5417. (11684) Impeachment disqualifies until acquittal—vacancy, how filled. Whenever articles of impeachment against any officer subject to impeachment are presented to the senate, such officer is temporarily suspended from his office, and cannot act in his official capacity until he is acquitted. Upon such suspension of any officer, other than the governor, his office must be at once temporarily filled by an appointment made by the governor, with the advice and consent of the senate, until the acquittal of the party impeached; or, in case of his removal, until the vacancy is filled at the next election as required by law.

History: En. Sec. 1516, Pen. C. 1895; re-en. Sec. 8988, Rev. C. 1907; re-en. Sec. 11684, R. C. M. 1921. Cal. Pen. C. Sec. 751.

References

Gullickson v. Mitchell, 113 M 359, 369, 126 P 2d 1106.

Officers 58.

46 C.J. Officers § 192 et seq.

94-5418. (11685) Presiding officer when lieutenant-governor is impeached. If the lieutenant-governor is impeached, notice of the impeachment must be immediately given to the senate by the house of representatives, that another president may be chosen.

History: En. Sec. 1517, Pen. C. 1895; re-en. Sec. 8989, Rev. C. 1907; re-en. Sec. 11685, R. C. M. 1921. Cal. Pen. C. Sec. 752.

States 52.

59 C.J. States § 209 et seq.

94-5419. (11686) Impeachment not a bar to indictment. If the offense for which the defendant is convicted on impeachment is also the subject of

an indictment or information, the indictment or information is not barred thereby.

History: En. Sec. 1518, Pen. C. 1895;
re-en. Sec. 8990, Rev. C. 1907; re-en. Sec.
11686, R. C. M. 1921. Cal. Pen. C. Sec.
753.

Criminal Law 163.
22 C.J.S. Criminal Law § 240.

CHAPTER 55

REMOVAL OF OFFICERS OTHERWISE THAN BY IMPEACHMENT

- Section 94-5501. Officers subject to removal.
94-5502. Accusation, by whom presented.
94-5503. Form of accusation.
94-5504. To be transmitted to the county attorney and copy served.
94-5505. Proceedings if defendant does not appear.
94-5506. Defendant may object to or deny the accusation.
94-5507. Form of objection.
94-5508. Manner of denial.
94-5509. If objections overruled, defendant must answer.
94-5510. Proceedings on plea of guilty, refusal to answer, etc.
94-5511. Trial by jury.
94-5512. State and defendant entitled to process for witnesses.
94-5513. Judgment upon conviction and its form.
94-5514. Appeal—how taken—defendant to be suspended and vacancy filled.
94-5515. Proceedings for the removal of a county attorney.
94-5516. Removal of public officers by summary proceedings.

94-5501. (11687) Officers subject to removal. All officers not liable to impeachment are subject to removal for misconduct or malfeasance in office, as provided in this chapter.

History: En. Sec. 1530, Pen. C. 1895;
re-en. Sec. 8991, Rev. C. 1907; re-en. Sec.
11687, R. C. M. 1921.

Officers 66.
46 C.J. Officers § 145 et seq.
See generally, 43 Am. Jur. 30, Public
Officers, §§ 181 et seq.

References

State v. District Court, 61 M 558, 562,
202 P 756; State ex rel. Nagle v. Sullivan
et al., 98 M 425, 40 P 2d 995.

94-5502. (11688) Accusation, by whom presented. An accusation in writing against any district, county, township, or municipal officer or school trustee, for wilful or corrupt misconduct or malfeasance in office, may be presented by the grand jury, or filed by the county attorney, of the county for which the officer accused is elected or appointed, or an accusation may be filed by the attorney general.

History: En. Sec. 1531, Pen. C. 1895;
re-en. Sec. 8992, Rev. C. 1907; re-en. Sec.
11688, R. C. M. 1921; amd. Sec. 1, Ch.
216, L. 1939. Cal. Pen. C. Sec. 758.

Operation and Effect

This section was intended to apply to those cases only in which the accused has been guilty of willful or corrupt misconduct or malfeasance. State ex rel. Rowe v. District Court, 44 M 318, 323, 119 P 1103.

The power granted to the district court by section 94-5515 in a proceeding looking to the removal of the county attorney, to appoint the county attorney of an adjoining county to act as prosecuting officer,

may only be exercised when charges are preferred by a grand jury under this section. State ex rel. McGrade v. District Court, 52 M 371, 374, 157 P 1157.

Where removal of a district, township or county officer is sought for willful or corrupt misconduct or malfeasance in office—acts of commission—the jurisdiction of the district court, can, under this section, be invoked only by an accusation presented by the grand jury; where, however, the charge is willful refusal or neglect to perform official duties, constituting non-action, jurisdiction may be invoked by the filing of a verified petition by any person, under section 94-5516, whereupon

the court may try the accused summarily without the aid of a jury. State ex rel. Hessler v. District Court, 64 M 296, 297, 209 P 1052; State ex rel. Beazley v. District Court, 75 M 116, 118 et seq., 241 P 1075.

Held, under the rule that one may not be charged with a specific offense and convicted of another distinct and non-included offense, that an officer may not be charged with nonfeasance under section 94-5516, and convicted on proof of malfeasance, the prosecution charging which must be instituted in pursuance of this section. State v. Beazley, 77 M 430, 440 et seq., 250 P 1114.

Public officers who are not subject to impeachment may be removed for misconduct or malfeasance only by proceedings

had under an indictment of a grand jury, and for nonfeasance or for the collection of illegal fees under an accusation in writing. State ex rel. King v. Smith, 98 M 171, 174, 38 P 2d 274.

References

Cited or applied as section 1531, Penal Code, in State ex rel. Clark v. District Court, 30 M 442, 444, 76 P 1005; State v. District Court, 61 M 558, 202 P 756; State ex rel. Odenwald v. District Court, 98 M 1, 38 P 2d 269; State ex rel. Nagle v. Sullivan et al., 98 M 425, 40 P 2d 995.

Officers \Rightarrow 74 and specific topics.

46 C.J. Officers § 178 et seq.

43 Am. Jur. 62, Public Officers, §§ 235-237.

94-5503. (11689) Form of accusation. The accusation must state the offense charged, in ordinary and concise language, and without repetition.

History: En. Sec. 1532, Pen. C. 1895; re-en. Sec. 8993, Rev. C. 1907; re-en. Sec. 11689, R. C. M. 1921. Cal. Pen. C. Sec. 759.

References

State ex rel. King v. District Court, 95 M 400, 405, 26 P 2d 966.

94-5504. (11690) To be transmitted to the county attorney and copy served. The accusation must be delivered by the foreman of the grand jury to the county attorney of the county, except when he is the officer accused, who must cause a copy thereof to be served upon the defendant, and require, by notice in writing of not less than ten days, that he appear before the district court of the county, at a time mentioned in the notice, and answer the accusation. The original accusation must then be filed with the clerk of the court.

History: En. Sec. 1533, Pen. C. 1895; re-en. Sec. 8994, Rev. C. 1907; re-en. Sec. 11690, R. C. M. 1921. Cal. Pen. C. Sec. 760.

References

State ex rel. Odenwald v. District Court, 98 M 1, 38 P 2d 269.

94-5505. (11691) Proceedings if defendant does not appear. The defendant must appear at the time appointed in the notice and answer the accusation, unless for some sufficient cause the court assign another day for that purpose. If he does not appear, the court may proceed to hear and determine the accusation in his absence.

History: En. Sec. 1534, Pen. C. 1895; re-en. Sec. 8995, Rev. C. 1907; re-en. Sec.

11691, R. C. M. 1921. Cal. Pen. C. Sec. 761.

94-5506. (11692) Defendant may object to or deny the accusation. The defendant may answer the accusation either by objecting to the sufficiency thereof, or of any article therein, or by denying the truth of the same.

History: En. Sec. 1535, Pen. C. 1895; re-en. Sec. 8996, Rev. C. 1907; re-en. Sec. 11692, R. C. M. 1921. Cal. Pen. C. Sec. 762.

References

State ex rel. King v. District Court, 95 M 400, 406, 26 P 2d 966.

94-5507. (11693) Form of objection. If he objects to the legal sufficiency of the accusation, the objection must be in writing, but need not be in any

specific form, it being sufficient if it presents intelligibly the grounds of the objection.

History: En. Sec. 1536, Pen. C. 1895; re-en. Sec. 8997, Rev. C. 1907; re-en. Sec. 11693, R. C. M. 1921. Cal. Pen. C. Sec. 763.

References

State ex rel. King v. District Court et al., 95 M 400, 406, 26 P 2d 966.

94-5508. (11694) Manner of denial. If he denies the truth of the accusation, the denial may be oral and without oath, and must be entered upon the minutes.

History: En. Sec. 1537, Pen. C. 1895; re-en. Sec. 8998, Rev. C. 1907; re-en. Sec. 11693, R. C. M. 1921. Cal. Pen. C. Sec. 764.

References

State ex rel. King v. District Court, 95 M 400, 406, 26 P 2d 966.

94-5509. (11695) If objections overruled, defendant must answer. If an objection to the sufficiency of the accusation is not sustained, the defendant must answer thereto forthwith.

History: En. Sec. 1538, Pen. C. 1895; re-en. Sec. 8999, Rev. C. 1907; re-en. Sec. 11695, R. C. M. 1921. Cal. Pen. C. Sec. 765.

94-5510. (11696) Proceedings on plea of guilty, refusal to answer, etc. If the defendant pleads guilty, the court must render judgment of conviction against him. If he denies the matters charged or refuses to answer the accusation, the court must immediately, or at such time as it may appoint, proceed to try the accusation.

History: En. Sec. 1539, Pen. C. 1895; re-en. Sec. 9000, Rev. C. 1907; re-en. Sec. 11696, R. C. M. 1921. Cal. Pen. C. Sec. 766.

References

State v. District Court, 61 M 558, 202 P 756; State ex rel. Hessler v. District Court, 64 M 296, 297, 209 P 1052.

94-5511. (11697) Trial by jury. The trial must be by a jury, and conducted in all respects in the same manner as the trial of an indictment for a misdemeanor.

History: En. Sec. 1540, Pen. C. 1895; re-en. Sec. 9001, Rev. C. 1907; re-en. Sec. 11697, R. C. M. 1921. Cal. Pen. C. Sec. 767.

References

State ex rel. Hessler v. District Court, 64 M 296, 297, 209 P 1052; State v. Beazley, 77 M 430, 441, 250 P 1114.

Jury[⊖]19 (12).

50 C.J.S. Juries § 51.

94-5512. (11698) State and defendant entitled to process for witnesses. The county attorney and the defendant are respectively entitled to such process as may be necessary to enforce the attendance of witnesses, as upon a trial of an indictment.

History: En. Sec. 1541, Pen. C. 1895; re-en. Sec. 9002, Rev. C. 1907; re-en. Sec. 11698, R. C. M. 1921. Cal. Pen. C. Sec. 768.

Witnesses[⊖]2 (1).

70 C.J. Witnesses § 5 et seq.

94-5513. (11699) Judgment upon conviction and its form. Upon a conviction, the court must, at such time as it may appoint, pronounce judgment that defendant be removed from office; but, to warrant a removal, the judgment must be entered upon the minutes, and the causes of removal must be assigned therein.

History: En. Sec. 1542, Pen. C. 1895; re-en. Sec. 9003, Rev. C. 1907; re-en. Sec. 11699, R. C. M. 1921. Cal. Pen. C. Sec. 769.

94-5514. (11700) Appeal—how taken—defendant to be suspended and vacancy filled. In any proceeding instituted under the provisions of sections 94-5501 to 94-5516, both inclusive, an appeal may be taken to the supreme court by the plaintiff from a judgment in favor of the defendant, and by the defendant from a judgment removing him from his office, which appeal shall be taken in the same manner as from a judgment in a civil action; but if the appeal be from a judgment of removal, the defendant is suspended from his office pending such appeal, during which time the office must be filled as in case of a vacancy.

History: En. Sec. 1543, Pen. C. 1895; re-en. Sec. 9004, Rev. C. 1907; re-en. Sec. 11700, R. C. M. 1921; amd. Sec. 1, Ch. 141, L. 1931. Cal. Pen. C. Sec. 770.

References

State ex rel. King v. District Court, 95 M 400, 406, 26 P 2d 966.

94-5515. (11701) Proceedings for the removal of a county attorney. The same proceedings may be had on like grounds for the removal of a county attorney, except that the accusation must be delivered by the foreman of the grand jury to the clerk, and by him to a judge of the district court of the county, who must thereupon appoint some one to act as prosecuting officer in the matter, or place the accusation in the hands of the county attorney of an adjoining county, and require him to conduct the proceedings.

History: En. Sec. 1544, Pen. C. 1895; re-en. Sec. 9005, Rev. C. 1907; re-en. Sec. 11701, R. C. M. 1921. Cal. Pen. C. Sec. 771.

Id. A county attorney called into an adjoining county by appointment under this section, to act as prosecuting officer in a proceeding for the removal of a county attorney upon an accusation by a taxpayer charging neglect of duty, is not entitled to compensation for services thus rendered.

Operation and Effect

The power to appoint a prosecuting officer under this section applies only to proceedings instituted by the grand jury under section 94-5502, it does not confer upon the court the power to impose any duty upon a county attorney of another county as such, except in the particular emergency named, nor does it authorize the calling in of a county attorney from any other than an adjoining county. State ex rel. McGrade v. District Court, 52 M 371, 374, 157 P 1157.

References

State v. District Court, 61 M 558, 202 P 756; State ex rel. Hessler v. District Court, 64 M 296, 297, 209 P 1052.

District and Prosecuting Attorneys—

2 (5).
27 C.J.S. District and Prosecuting Attorneys §§ 6, 7, 9.

94-5516. (11702) Removal of public officers by summary proceedings. When an accusation in writing, verified by the oath of any person, is presented to the district court, alleging that any officer within the jurisdiction of the court has been guilty of knowingly, wilfully, and corruptly charging and collecting illegal fees for services rendered, or to be rendered, in his office, or has wilfully refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the accusation was presented; and on that day, or some other subsequent day not more than forty days from the date on which the accusation was presented, must proceed to hearing, in a summary manner, or trial, upon the accusation and evidence offered in support of the same, and the answer and evidence offered by the party accused; provided, if the charge be for the charging and collecting of illegal fees or salaries, the trial must be by jury, if the defendant so demands, and conducted in all respects and in the

same manner as the trial of an indictment for a misdemeanor, and the defendant shall be entitled, as a matter of defense, to offer evidence of, and the jury under proper instructions shall consider, his good faith or honest mistake, if any be shown, and the value received by the state, county, township, or municipality against whom the charges or fees were made. If, upon such hearing or trial, the charge is sustained, the court must enter a judgment that the party accused be deprived of his office, and for such costs as are allowed in civil cases; and if the charge is not sustained, the court may enter a judgment against the complaining witness for costs as are allowed in civil cases.

History: En. Sec. 1545, Pen. C. 1895; re-en. Sec. 9006, Rev. C. 1907; amd. Sec. 1, Ch. 25, L. 1917; re-en. Sec. 11702, R. C. M. 1921. Cal. Pen. C. Sec. 772.

Constitutionality

This section is not unconstitutional on the ground that the prosecution is not by information or indictment. The proceedings therein prescribed do not necessarily partake of the nature of a criminal prosecution, and the legislature was left entirely free to enact such statutes as it might see fit providing for the removal of officers other than those who may be removed by impeachment. State ex rel. Payne v. District Court, 53 M 350, 356, 165 P 294.

Applicable to Hearing Before Governor

This statute providing that the defendant shall be entitled, in defense, to offer evidence of his good faith, such declaration evidences the public policy of the state and must be held applicable to proceeding instituted by the governor for the removal of members of the state highway commission at a hearing before him, and denial of the right is error. State ex rel. Holt v. District Court, 103 M 438, 444, 63 P 2d 1026.

Costs

In an action for the removal of county officers brought by the attorney general in the name and on behalf of the state, the county, and not the attorney general personally, is liable for the payment of witness fees. Griggs v. Glass, 58 M 476, 479, 193 P 564.

Disqualification of Governor—Control of Discretion

In the absence of a statute providing for the disqualification of the governor on account of prejudice from hearing charges for removal of members of a state commission, existence of such prejudice does not disqualify the governor; the proceeding is not judicial in character; and under the theory of independence of departments, the judiciary may compel governor to hear such proceeding, but it may not

control executive discretion. State ex rel. Holt v. District Court, 103 M 438, 447, 448, 63 P 2d 1026.

Disqualification of Judge When not Permitted

Held, that proceedings for the removal of civil officers under this section are criminal in their nature, and that therefore neither party has the right to file an affidavit disqualifying a district judge for imputed bias or prejudice under section 93-901. (Mr. Justice Holloway dissenting.) State v. District Court, 61 M 558, 559, 202 P 756.

Evidence Admissible as a Defense

Where among other defenses to an accusation against a county commissioner charging the collection of illegal fees for supervising road and kindred work, defendant set up the plea of value received by the county, the court erred in restricting testimony offered for the purpose of showing that the county had been saved large sums in the construction of roads by reason of his services, to a showing what like services were reasonably worth, the offered evidence having been made admissible by the express terms of this section, in such a proceeding. State v. Russell, 84 M 61, 65, 274 P 148.

Fees Illegally Collected—Effect

The district court may remove a police judge from office for illegally collecting a fee from a defendant for approving a bond filed in support of an appeal from a judgment of conviction for a violation of a city ordinance. State ex rel. Rowe v. District Court, 45 M 205, 209, 122 P 270.

"Illegal Fees" Defined

The term "fees," used in the codes, is somewhat elastic, and as employed in this section is broad enough to comprehend both per diem and expenses. State ex rel. Payne v. District Court, 53 M 350, 353, 165 P 294; State v. Story, 53 M 573, 575, 576, 165 P 748.

Fees are illegal within the meaning of this section if collected for services never rendered, or never intended to be ren-

dered; if collected for services rendered for which no compensation is allowed by law; or if collected for services at a rate higher than the law allows therefor. State ex rel. Payne v. District Court, 53 M 350, 354, 165 P 294.

A county commissioner is not entitled to a fee for attending to business of the county, other than meeting with the board of commissioners, and for "inspecting and overseeing road-work," where he is not acting pursuant to any previous direction of the board; hence, if he makes a charge against the county for such services, as county commissioner, and collects the money therefor, he is guilty of charging and collecting illegal fees by virtue of his official position, and he may be removed from office therefor under this section. State v. Story, 53 M 573, 165 P 748; State v. Callahan, 53 M 584, 165 P 753; State v. Overstreet, 53 M 585, 165 P 753.

"Illegal fees" are any moneys collected or attempted to be collected by such officer from any source whatever, whether as mileage, per diem, or specific charge for service rendered in his office, without authority of law for such collection, though done in good faith and for efficient service performed for the public. State v. Story, 53 M 573, 576, 165 P 748.

Illegal Fees for Services Rendered in Office—What Does not Constitute

Under this section, a county officer may summarily be removed for corruptly collecting "illegal fees for services rendered in his office." Held, that under this section a county commissioner may not be removed unless it be alleged and proved that he collected illegal fees for services rendered in his office while acting in his official capacity, and that an accusation charging the collection of his expenses and per diem during his attendance at a state meeting of county commissioners, though under Chapter 48, Laws of 1927 (25-508), another member of the board had been designated to attend such meeting, was properly demurrable, the fees alleged to have been illegally received not having been received by defendant for services rendered in his office. State ex rel. King v. Smith, 98 M 171, 174, 38 P 2d 274.

In no way can it be ascertained whether an officer has collected illegal fees within the meaning of this section without a reference to the various code sections in the chapter on "Salaries and Fees of Officers." State v. Story, 53 M 573, 578, 165 P 748.

Intent

The amendment of this section, by making a criminal intent the gist of the offense, deprived the district court of jurisdiction of a prosecution instituted prior thereto, since no saving clause is provided

by the constitution or statute. State ex rel. Paige v. District Court, 54 M 332, 169 P 1180.

Jury Trial not Authorized

The proceeding authorized by this section is quasi-criminal in character, but the accused is not entitled to a jury trial. State ex rel. Rowe v. District Court, 44 M 318, 327, 119 P 1103; State ex rel. Payne v. District Court, 53 M 350, 356, 165 P 294. See also State ex rel. McGrade v. District Court, 52 M 371, 373, 157 P 1157.

Held, that an officer (county clerk), charged with willful neglect of duty is not entitled to a trial by jury in a proceeding for his removal from office. State v. District Court et al., 62 M 600, 602 et seq., 205 P 955.

Where removal of a county, district or township officer is sought for willful or corrupt misconduct or malfeasance in office—acts of commission—the jurisdiction of the district court can, under section 94-5502, be invoked only by an accusation presented by the grand jury; where, however, the charge is willful refusal or neglect to perform official duties, constituting non action, jurisdiction may be invoked by the filing of a verified petition by any person, under this section, whereupon the court may try the accused summarily without the aid of a jury. State ex rel. Hessler v. District Court, 64 M 296, 297 et seq., 209 P 1052.

Where willful or corrupt malfeasance in office is charged, ouster proceedings must be had under the provisions of section 94-5502, and the accused officer is entitled to a jury trial; where the charge is non-feasance only, the proceeding is, under this section, triable summarily by the court without the intervention of a jury. State ex rel. Beazley v. District Court, 75 M 116, 117 et seq., 241 P 1075.

Nature of Action

The proceeding under this section, though it may be instituted by a private person, is a public proceeding, and, except that it is summary in its nature, is to be classed as a prosecution for crime. State ex rel. Rowe v. District Court, 44 M 318, 324, 119 P 1103; State v. Driscoll, 49 M 558, 560, 144 P 153; State ex rel. McGrade, 52 M 371, 373, 157 P 1157.

A proceeding brought for the removal of a public officer under this section is not a criminal action in the sense that it must be brought in the name of the state, that the public prosecutor must conduct it, or a jury be called to try the accused. State ex rel. Payne v. District Court, 53 M 350, 356, 357, 165 P 294; State ex rel. McGrade v. District Court, 52 M 371, 373, 157 P 1157, distinguished.

A proceeding to remove a public officer (county commissioner) for collecting illegal fees is not a quasi-criminal one, hence the rules of pleading governing in a criminal action are not applicable; on the contrary, a wide liberality in the matter of pleading in such a proceeding is allowable. *State ex rel. King v. District Court*, 95 M 400, 404, 26 P 2d 966.

A proceeding to oust a board of county commissioners for neglect of duty, joined with accusations against each member thereof charging corrupt collection of illegal fees and salary, brought under this section, was dismissed without prejudice on motion of counsel for the plaintiff because of illness of principal counsel. Within a few months thereafter another taxpayer filed accusations identical with those theretofore dismissed, adding two new charges against the officers individually alleging collection of illegal fees. On the theory that the several accusations constituted misdemeanors and were criminal in nature, the accused interposed pleas in bar to the renewed accusations in reliance upon section 94-9507. The pleas were sustained. Held, on application for writ of supervisory control, that such proceedings are neither criminal nor quasi-criminal; that all steps (other than those on the trial) are governed by the rules of practice in civil cases, and that therefore the pleas in bar were improperly sustained. *State ex rel. Odenwald v. District Court*, 98 M 1, 7, 38 P 2d 269; *State ex rel. King v. Smith*, 98 M 171, 38 P 2d 274.

Operation in General

One of the methods provided by law for the removal of an officer from office is a summary proceeding, as prescribed in this section, initiated upon a written accusation verified by the oath of "any person." *State v. Driscoll*, 49 M 558, 561, 144 P 153.

Remedy to Review Action of Court

As this section makes no provision for an appeal or other means of review, mandamus lies to compel the district court to proceed with the trial of an accusation for the removal of a public officer under this section. *State ex rel. Payne v. District Court*, 53 M 350, 357, 165 P 294.

Held, that where proceedings for the removal of county commissioners under this section which, hereunder, were required to be heard within forty days after presentation of the accusation, were disposed of by a judgment of dismissal sustaining pleas in bar interposed by the accused on the theory that the proceedings were of a criminal nature, and an appeal from the judgment could not be disposed of before the expiration of the above time limit, an exigency existed making the remedy by appeal inadequate and requiring summary

action by the supreme court, and that, therefore, the writ of supervisory control was the proper remedy. *State ex rel. Odenwald v. District Court*, 98 M 1, 5, 38 P 2d 269.

See section 94-5514 as amended by Ch. 141, L. 1931, which allows an appeal from judgment.

Requisites of Accusation

To charge the existence of a riot for failure to suppress which a sheriff was sought to be removed from office, it was not necessary to employ the language of the statute defining riot; a statement of facts from which its existence was inferable being sufficient. *State v. Driscoll*, 49 M 558, 565, 144 P 153.

Id. An accusation against a sheriff for neglect of duty, in failing to suppress a riot, and asking his removal from office, is not objectionable because specific crimes therein mentioned as having been committed during the riot were not described with the particularity required in an indictment or information against the perpetrators thereof, their commission having been incidental only, and in nowise affecting the duty of the sheriff in the premises.

Id. An accusation for the removal of a sheriff from office because of neglect of official duty, which was entitled in the name of the state "on the accusation" of certain persons, was sufficient in form where it was apparent from the whole body of the document that a public proceeding and not a private action was thereby initiated, and it was not necessary to allege therein that the accuser was an elector of the county in which the accused held office.

The gist of the offense condemned by this section is the collection of illegal fees by virtue of official position. To constitute the offense it must be made to appear that the accused is the incumbent of a public office, that, acting by virtue of his office, he collected certain fees, and that the fees were illegal; that is, not authorized by law under the circumstances of the particular case. *State ex rel. Payne v. District Court*, 53 M 350, 353, 354, 165 P 294.

An accusation charging an officer with collecting illegal fees will be held sufficient if it clearly and distinctly sets forth the facts constituting the offense in ordinary and concise language and in such manner that a person of common understanding may know what is intended. It will also be sufficient if it shows on its face that the fees collected were illegal, and a statement that they were illegal is not required. *State ex rel. Payne v. District Court*, 53 M 350, 354, 355, 165 P 294; *State v. Story*, 53 M 573, 575, 165 P 748.

One charging a district or county officer with an act of misfeasance or malfeasance in office, a matter of which the grand jury must take cognizance, cannot by pleading that after such act had been done the officer willfully refused and neglected to undo it, bring the accusation within the purview of section 94-5516, under which an officer may be tried summarily for such refusal or neglect, nor may he justify the procedure followed by the argument *ab inconvenienti*. State ex rel. Hessler v. District Court, 64 M 296, 297 et seq., 209 P 1052.

Summary Removal for Nonfeasance on Evidence Showing Malfeasance not Permissible

A sheriff was sought to be removed summarily under this section, under a charge of alleged nonfeasance in office preferred by the county attorney. The evidence introduced at the trial showed his active participation in the crime of bribery, demanding money to prevent official action on his part. Held, that his offense constituted malfeasance in office which was triable only, on accusation presented by the grand jury, with the aid of a jury, and that the trial judge was without jurisdiction to remove him on the proof submitted. State v. Beazley, 77 M 430, 437 et seq., 250 P 1114.

Time Limit Within Which Hearing to be Had not Statute of Limitations

The provision of this section that a proceeding for the removal of a public officer within the jurisdiction of the court in which brought must be brought to trial within forty days after the filing of the accusation, simply means a speedy trial and is in no sense a statute of limitation against the prosecution of the charges made. State ex rel. Odenwald v. District Court, 98 M 1, 13, 38 P 2d 269.

When Court May Appoint an Attorney to Prosecute

Proceedings under this section being of

a criminal nature, the district court is empowered by section 94-7239 to appoint some attorney in such a proceeding to perform the duties of the county attorney whenever the latter is absent on account of either neglect or sickness, or is disqualified for any reason. State ex rel. McGrade v. District Court, 52 M 371, 373, 374, 157 P 1157.

Where Accused Entitled to Jury Trial

Held, that while there has been more or less disagreement in various decisions of this court in interpreting this section, when taken as a whole and when the mandatory features of the statute are considered, relative to accusations for the taking of illegal fees, we are convinced that the accused in the case at bar was entitled to a jury trial and also was entitled to have the proceeding commenced within the forty days as provided therein. Action to remove school trustee. State ex rel. Galbreath v. District Court, 108 M 425, 427, 91 P 2d 424.

Where Court's Injunction Preventing Further Inquiry by Governor Exceeded Jurisdiction

Where governor denied members of state highway commission in removal proceedings right to introduce evidence of good faith in collecting fees, and court issued writ of certiorari to review proceedings and restraining order preventing further inquiry, injunction was ordered modified so as not to prevent further hearing on same charges, or charges thereafter filed. State ex rel. Holt v. District Court, 103 M 438, 448, 63 P 2d 1026.

References

State ex rel. Nagle v. Sullivan et al., 98 M 425, 40 P 2d 995.

43 Am. Jur. 59, Public Officers, §§ 225 et seq.

CHAPTER 56

LOCAL JURISDICTION OF PUBLIC OFFENSES

- Section 94-5601. Jurisdiction of offenses committed in this state.
 94-5602. Offenses commenced without, but consummated within this state.
 94-5603. When an inhabitant of this state is concerned in a duel out of the same and a party wounded dies therein.
 94-5604. Leaving the state to evade the statute against dueling.
 94-5605. Offense committed partly in one county and partly in another.
 94-5606. Committed on the boundary, etc., of two or more counties.
 94-5607. Jurisdiction of an offense on board a vessel or car.
 94-5608. Jurisdiction for kidnaping or abduction.
 94-5609. Jurisdiction of an indictment for bigamy or incest.

- 94-5610. Property feloniously taken in one county and brought into another, and apportioning costs of prosecution and trial by judge.
- 94-5611. Jurisdiction for escaping from prison.
- 94-5612. Jurisdiction for treason committed out of the state.
- 94-5613. Jurisdiction for stealing, etc. property out of state and brought therein.
- 94-5614. Jurisdiction for murder, etc. where the injury was inflicted in one county and the party dies out of that county.
- 94-5615. On an indictment against an accessory.
- 94-5616. Of principals who are not present, etc., at commission of the principal offense.
- 94-5617. Conviction or acquittal in another state a bar, where the jurisdiction is concurrent.
- 94-5618. Conviction or acquittal in another county a bar, where the jurisdiction is concurrent.
- 94-5619. Jurisdiction of prizefight.

94-5601. (11703) Jurisdiction of offenses committed in this state. Every person is liable to punishment by the laws of this state, for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States.

History: En. Sec. 1560, Pen. C. 1895; re-en. Sec. 9007, Rev. C. 1907; re-en. Sec. 11703, R. C. M. 1921. Cal. Pen. C. Sec. 777.

Tribal Indian

Crime committed by tribal Indian against Indian girl while off reservation, held, as against contention that federal court had exclusive jurisdiction of the offense, that it having been committed off the reservation but within the borders of the state, the state court properly entertained jurisdiction. *State v. Youpee*, 103 M 86, 91, 61 P 2d 832.

Where defendant, charged with larceny

of a horse, claiming to be an Indian and a ward of the federal government and that, if any offense was committed, it was committed upon Indian land and that therefore the federal court had jurisdiction made no showing that the entire asportation under the circumstances was on Indian land, the state court presumptively had jurisdiction, and his motion challenging its jurisdiction at the time of pronouncement of sentence was properly denied. *State v. Akers*, 106 M 43, 58, 74 P 2d 1138.

Criminal Law 92.

22 C.J.S. Criminal Law § 127.

94-5602. (11704) Offenses commenced without, but consummated within this state. When the commission of a public offense, commenced without the state, is consummated within its boundaries, the defendant is liable to punishment therefor in this state though he was out of the state at the time of the commission of the offense charged. If he consummated it in this state, through the intervention of an innocent or guilty agent, or any other means proceeding directly from himself, in such case the jurisdiction is in the county in which the offense is consummated.

History: En. Sec. 1561, Pen. C. 1895; re-en. Sec. 9008, Rev. C. 1907; re-en. Sec. 11704, R. C. M. 1921. Cal. Pen. C. Sec. 778.

Operation and Effect

Under this section and sections 94-5610 and 94-5613, permitting conviction in any county into which the guilty person takes stolen property, there is no variance between the venue as laid in an information charging larceny of horses in a certain county of this state, and proof that the horses were stolen in Canada, and driven into said county. *State v. De Wolfe*, 29 M 415, 421, 74 P 1084.

Id. Under this section and sections 94-5610 and 94-5613, one who commits larceny may be convicted of that crime in any county into which he takes the stolen property.

Criminal Law 97 (1).

22 C.J.S. Criminal Law § 134.

14 Am. Jur. 926, Criminal Law, §§ 226, 227.

Absence from state at time of offense as affecting jurisdiction of offense. 42 ALR 272.

94-5603. (11705) When an inhabitant of this state is concerned in a duel out of the same and a party wounded dies therein. When an inhabitant or

resident of this state, by previous appointment or engagement, fights a duel or is concerned as a second therein, out of the jurisdiction of this state, and in the duel a wound is inflicted upon a person, whereof he dies in this state, the jurisdiction of the offense is in the county where the death happens.

History: En. Sec. 1562, Pen. C. 1895; re-en. Sec. 9009, Rev. C. 1907; re-en. Sec. 11705, R. C. M. 1921. Cal. Pen. C. Sec. 779.

94-5604. (11706) Leaving the state to evade the statute against dueling.

When an inhabitant of this state leaves the same for the purpose of evading the operation of the provisions of the code relating to dueling and challenges to fight, with the intent or for the purpose of doing any of the acts prohibited therein, the jurisdiction is in the county of which the offender was an inhabitant when the offense was committed.

History: En. Sec. 1563, Pen. C. 1895; re-en. Sec. 9010, Rev. C. 1907; re-en. Sec. 11706, R. C. M. 1921. Cal. Pen. C. Sec. 780.

94-5605. (11707) Offense committed partly in one county and partly in another. When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county.

History: En. Sec. 14, p. 220, Bannack Stat.; re-en. Sec. 32, p. 194, Cod. Stat. 1871; re-en. Sec. 32, 3d Div. Rev. Stat. 1879; re-en. Sec. 32, 3d Div. Comp. Stat. 1887; amd. Sec. 1564, Pen. C. 1895; re-en. Sec. 9011, Rev. C. 1907; re-en. Sec. 11707, R. C. M. 1921. Cal. Pen. C. Sec. 781.

Operation and Effect

An information stating generally that a crime was committed in Missoula county, but containing no other allegation as to venue, is sufficient; it not being necessary that it should allege that the crime was not committed on the Fort Missoula military reservation, which is situated within that county. Judicial notice may be taken of the fact that the reservation in question is situated in Missoula county. *State v. Tully*, 31 M 365, 369, 78 P 760.

Under the rule declared by this section, that where the acts constituting or requisite to the consummation of an offense occurred in two counties, trial may be had in either, held that where defendants, president and cashier of a bank, prepared

an alleged false report to the superintendent of banks in P. county and transmitted it by mail to the superintendent of banks in L. & C. county, the district court of the former county had jurisdiction. *State v. Cassill et al.*, 70 M 433, 227 P 49.

Criminal Law § 112 (1).

22 C.J.S. Criminal Law § 177.

14 Am. Jur. 928, Criminal Law, § 231.

Pendency in one county of charge of larceny as bar to subsequent charge in another county of offense which involves both felonious breaking and felonious taking of the same property. 19 ALR 636.

Conviction or acquittal in one district as bar to prosecution in another, based on continuous transportation of intoxicating liquor. 24 ALR 1125.

Continuous transaction constituting a complete offense in each county or district as constituting more than one offense. 73 ALR 1511.

Constitutionality of statute for prosecution of offense in county other than that in which it was committed. 76 ALR 1034.

94-5606. (11708) Committed on the boundary, etc., of two or more counties. When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county.

History: En. Sec. 1565, Pen. C. 1895; re-en. Sec. 9012, Rev. C. 1907; re-en. Sec. 11708, R. C. M. 1921. Cal. Pen. C. Sec. 782.

Judicial Notice as to Location

Courts will take judicial notice of the fact that a point located a given number

of miles from a named town is in a certain county, hence that a point twenty-five miles north of Brockton is in Roosevelt county. *State v. Akers*, 106 M 43, 58, 74 P 2d 1138.

References

Cited or applied as section 1565, Penal Code, in *State v. Tully*, 31 M 365, 369, 78 P 760.

Criminal Law § 111.

22 C.J.S. Criminal Law § 178.

94-5607. (11709) Jurisdiction of an offense on board a vessel or car.

When an offense is committed in this state, on board a vessel navigating a river, bay, slough, lake, or canal, or lying therein, in the prosecution of her voyage, the jurisdiction is in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage terminates; and when the offense is committed in this state, on a railroad train or car prosecuting its trip, the jurisdiction is in any county through which the train or car passes in the course of her trip, or in the county where the trip terminates.

History: En. Sec. 1566, Pen. C. 1895; re-en. Sec. 9013, Rev. C. 1907; re-en. Sec. 11709, R. C. M. 1921. Cal. Pen. C. Sec. 783.

94-5608. (11710) Jurisdiction for kidnaping or abduction. The jurisdiction of the following cases is in any county in which the offense was committed, or into or out of which the person upon whom the offense was committed has been brought:

1. For forcibly, fraudulently taking, inveigling, or kidnaping any person to be sent out of the state for any purpose;

2. For the taking or enticing away of any female for the purpose of prostitution or concubinage;

3. For the taking, decoying, or enticing away a child under the age of fifteen years, with intent to conceal or detain it from its parents, guardians, or other person having lawful charge thereof.

History: Ap. p. Sec. 16, p. 221, Bannack Stat.; en. Sec. 33, p. 194, Cod. Stat. 1871; re-en. Sec. 33, 3d Div. Rev. Stat. 1879; re-en. Sec. 33, 3d Div. Comp. Stat. 1887; amd. Sec. 1567, Pen. C. 1895; re-en. Sec.

9014, Rev. C. 1907; re-en. Sec. 11710, R. C. M. 1921. Cal. Pen. C. Sec. 784.

14 Am. Jur. 928, Criminal Law, § 231.

94-5609. (11711) Jurisdiction of an indictment for bigamy or incest.

When the offense, either of bigamy or incest, is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county.

History: En. Sec. 1568, Pen. C. 1895; re-en. Sec. 9015, Rev. C. 1907; re-en. Sec. 11711, R. C. M. 1921. Cal. Pen. C. Sec. 785.

94-5610. (11712) Property feloniously taken in one county and brought into another, and apportioning costs of prosecution and trial by the judge.

When property taken in one county by burglary, robbery, or larceny has been brought into another, the jurisdiction of the offense is in either county. But if at any time before the conviction of the defendant in the latter, he is indicted or informed against in the former county, the sheriff of the latter county must, upon demand, deliver him to the sheriff of the former.

Provided, however, that when the trial or prosecution is had in the county to which the property is brought after its taking as aforesaid, the county in which the property was so taken shall be liable for all or such proportion

of the costs of the prosecution and trial as the judge of the court in which the prosecution or trial has been or may be had shall or may certify as proper costs against the county in which the property was taken, in the same manner and to the same extent as if the prosecution had been instituted in the county in which the property was so taken as aforesaid; and the proportion of said costs so found as payable by the county from which the property was so taken shall be paid by it in the same manner as if the action or prosecution had been commenced in the latter county and the venue of the action or prosecution changed to the county to which the property is brought, as provided in section 16-3804 so far as the same is pertinent hereto.

History: En. Sec. 17, p. 221, Bannack Stat.; re-en. Sec. 34, p. 195, Cod. Stat. 1871; re-en. Sec. 34, 3d Div. Rev. Stat. 1879; re-en. Sec. 34, 3d Div. Comp. Stat. 1887; amd. Sec. 1569, Pen. C. 1895; re-en. Sec. 9016, Rev. C. 1907; re-en. Sec. 11712, R. C. M. 1921; amd. Sec. 1, Ch. 21, L. 1937. Cal. Pen. C. Sec. 786.

Constitutionality

Held, that this section, as amended, is not unconstitutional as being in conflict with art. III, sec. 27, the due process of law clause of the constitution, art. XII, sec. 4 of the constitution prohibiting the legislature from levying taxes upon the inhabitants or property in, inter alia, counties for county purposes, nor open to objection that it violates art. V, sec. 23 of the Constitution, prohibiting more than one subject in a legislative bill and requiring that it be expressed in its title. Rosebud County v. Flinn, 109 M 537, 539, 543, 98 P 2d 330.

Animal Driven into Another County

While jurisdiction in prosecution for larceny of livestock is determined by place where crime is committed, where property is taken in one county and thereafter brought into another, jurisdiction under this section is in either county; held, in case of concerted plan to steal horses and ship out of state by railroad, there was continuous commission of the crime from place of taking to destination, even though defendant's active participation ceased at a place between, and county into which animal driven had jurisdiction. State v. Akers, 106 M 43, 56, 74 P 2d 1138.

Judicial Notice as to Location

Courts will take judicial notice of the fact that a point located a given number of miles from a named town is in a certain county, hence that a point twenty-five miles north of Brockton is in Roosevelt county. State v. Akers, 106 M 43, 58, 74 P 2d 1138.

"Larceny"

"Larceny", as used in this section means grand larceny, the title of the act referring to property feloniously taken characterizing that crime as a felony. Rosebud County v. Flinn, 109 M 537, 541, 98 P 2d 330.

Meaning of Words "Prosecution" and "Costs"

Apparently only one construction can be given to art. III, sec. 8, art. VIII, sec. 27 of the constitution of Montana, and sec. 94-6201 appearing to have defined the meaning of the term "prosecution", namely, that the prosecution commences with the filing of the information or indictment, and not before. This section, where it uses the term "costs" means any legal and proper costs of prosecution and trial after filing of the information, including cost and expense of investigation and production of evidence. Costs incurred preliminary to filing the information are not proper claims against county where offense committed. Rosebud County v. Flinn, 109 M 537, 541, 98 P 2d 330.

References

Cited or applied as section 1569, Penal Code, in State v. De Wolfe, 29 M 415, 421, 74 P 1084.

94-5611. (11713) Jurisdiction for escaping from prison. The jurisdiction of a criminal action for escaping from prison is in any county of the state.

History: En. Sec. 1570, Pen. C. 1895; re-en. Sec. 9017, Rev. C. 1907; re-en. Sec. 11713, R. C. M. 1921. Cal. Pen. C. Sec. 787.

Criminal Law §108 (1).
22 C.J.S. Criminal Law §174 et seq.

94-5612. (11714) Jurisdiction for treason committed out of the state. The jurisdiction of a criminal action for treason, when the overt act is committed out of the state, is in any county of the state.

History: En. Sec. 1571, Pen. C. 1895; re-en. Sec. 9018, Rev. C. 1907; re-en. Sec. 11714, R. C. M. 1921. Cal. Pen. C. Sec. 788.

94-5613. (11715) Jurisdiction for stealing, etc. property out of state and brought therein. The jurisdiction of a criminal action for stealing in any other state the property of another, or receiving it, knowing it to have been stolen, and bringing the same into this state, is in any county into or through which such stolen property has been brought.

History: En. Sec. 1572, Pen. C. 1895; re-en. Sec. 9019, Rev. C. 1907; re-en. Sec. 11715, R. C. M. 1921. Cal. Pen. C. Sec. 789.

References

Cited or applied as section 1572, Penal Code, in *State v. De Wolfe*, 29 M 415, 421, 74 P 1084.

14 Am. Jur. 928, Criminal Law, § 231.

94-5614. (11716) Jurisdiction for murder, etc. where the injury was inflicted in one county and the party dies out of that county. The jurisdiction of a criminal action for murder or manslaughter, when the injury which caused the death was inflicted in one county, and the party injured dies in another county, or out of the state, is in the county where the injury was inflicted.

History: En. Sec. 31, p. 275, Cod. Stat. 1871; re-en. Sec. 31, 4th Div. Rev. Stat. 1879; re-en. Sec. 31, 4th Div. Comp. Stat. 1887; amd. Sec. 1573, Pen. C. 1895; re-en. Sec. 9020, Rev. C. 1907; re-en. Sec. 11716, R. C. M. 1921. Cal. Pen. C. Sec. 790.

Operation and Effect

Where a person is shot in one county but dies in another, and defendant is charged with murder in the former county, it is unnecessary to allege where the de-

ceased died; and, though it is alleged that he died in the county where the fatal shot was fired, while the evidence shows that he died in another county, there is no variance. That term refers to a disagreement between the allegations in the information and the proof, with reference to some matter that is legally essential to the charge. *State v. Crean*, 43 M 47, 54, 114 P 603.

14 Am. Jur. 928, Criminal Law, § 231.

94-5615. (11717) On an indictment against an accessory. In the case of an accessory in the commission of a public offense, the jurisdiction is in the county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another.

History: En. Sec. 1574, Pen. C. 1895; re-en. Sec. 9021, Rev. C. 1907; re-en. Sec. 11717, R. C. M. 1921. Cal. Pen. C. Sec. 791.

Criminal Law 110.

22 C.J.S. Criminal Law § 184.

94-5616. (11718) Of principals who are not present, etc., at commission of the principal offense. The jurisdiction of a criminal action against a principal in the commission of a public offense, when such principal is not present at the commission of the principal offense, is in the same county it would be under this code if he were present and aiding and abetting therein.

History: En. Sec. 1575, Pen. C. 1895; re-en. Sec. 9022, Rev. C. 1907; re-en. Sec. 11718, R. C. M. 1921. Cal. Pen. C. Sec. 792.

94-5617. (11719) Conviction or acquittal in another state a bar, where the jurisdiction is concurrent. When an act charged as a public offense is within the jurisdiction of another state or county as well as of this state,

a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this state.

History: En. Sec. 1576, Pen. C. 1895;
re-en. Sec. 9023, Rev. C. 1907; re-en. Sec.
11719, R. C. M. 1921. Cal. Pen. C. Sec. 793.

15 Am. Jur. 67, Criminal Law, §§ 393
et seq.

Conviction or acquittal under Federal
statute as bar to prosecution under state
or territorial statute, or vice versa. 16
ALR 1231.

Criminal Law 161.

22 C.J.S. Criminal Law § 238.

94-5618. (11720) Conviction or acquittal in another county a bar, where the jurisdiction is concurrent. When an offense is within the jurisdiction of two or more counties, a conviction or acquittal thereof in one county is a bar to prosecution or indictment therefor in another.

History: En. Sec. 1577, Pen. C. 1895;
re-en. Sec. 9024, Rev. C. 1907; re-en. Sec.
11720, R. C. M. 1921. Cal. Pen. C. Sec. 794.

94-5619. (11721) Jurisdiction of prizefight. The jurisdiction of a violation of sections 94-35-163, 94-35-164 and 94-35-165, or a conspiracy to violate either of said sections, is in any county, first, in which any act is done toward the commission of the offense; or, second, into, out of, or through which the offender passed to commit the offense; or, third, where the offender is arrested.

History: En. Sec. 1578, Pen. C. 1895;
re-en. Sec. 9025, Rev. C. 1907; re-en. Sec.
11721, R. C. M. 1921. Cal. Pen. C. Sec. 795.

Criminal Law 108 (1), 112 (3).

22 C.J.S. Criminal Law §§ 174, 175, 177,
185.

CHAPTER 57

TIME OF COMMENCING CRIMINAL ACTIONS

- Section 94-5701. Prosecution for murder may be commenced at any time.
94-5702. Limitation of five years in all other felonies.
94-5703. Limitation of one year in misdemeanors.
94-5704. Exception when defendant is out of the state.
94-5705. Indictment found, when presented and filed.
94-5706. Time not counted.

94-5701. (11722) Prosecution for murder may be commenced at any time. There is no limitation of time within which a prosecution for murder or manslaughter must be commenced. It may be commenced at any time after the death of the person killed.

History: En. Sec. 20, p. 221, Bannack
Stat.; re-en. Sec. 37, p. 195, Cod. Stat.
1871; re-en. Sec. 37, 3d Div. Rev. Stat.
1879; re-en. Sec. 37, 3d Div. Comp. Stat.
1887; amd. Sec. 1580, Pen. C. 1895; re-en.
Sec. 9026, Rev. C. 1907; re-en. Sec. 11722,
R. C. M. 1921. Cal. Pen. C. Sec. 799.

References

Cited or applied as section 9026, Revised
Codes, in State v. Vanella, 40 M 326, 342,
106 P 364.

Criminal Law 147.

22 C.J.S. Criminal Law § 225.

94-5702. (11723) Limitation of five years in all other felonies. An indictment for any other felony than murder or manslaughter must be found, or an information filed, within five years after its commission.

History: En. Sec. 22, p. 221, Bannack
Stat.; re-en. Sec. 39, p. 195, Cod. Stat.
1871; re-en. Sec. 39, 3d Div. Rev. Stat.
1879; re-en. Sec. 39, 3d Div. Comp. Stat.
1887; amd. Sec. 1581, Pen. C. 1895; re-en.

Sec. 9027, Rev. C. 1907; re-en. Sec. 11723,
R. C. M. 1921. Cal. Pen. C. Sec. 800.

Operation and Effect

Unless time is a material ingredient in

the offense or in charging the same, it is only necessary to prove that it was committed prior to the findings or filing of the information or indictment. *State v. Rogers*, 31 M 1, 4, 77 P 293.

Held, that where an offense which is not divisible into degrees and does not include a lesser offense, is punishable either as a misdemeanor or as a felony in the discretion of the court or jury, it is the possible sentence which determines the grade of the crime; hence it is to be deemed a felony up to the time of judgment, whereupon, if the punishment inflicted be other than imprisonment in the state prison, it is to be considered a misdemeanor for all purposes, under this section. *State v. Atlas*, 75 M 547, 550, 244 P 477.

15 Am. Jur. 31, Criminal Law, §§ 342 et seq.

Discharge of accused under limitation statute as bar to subsequent prosecution for same offense. 3 ALR 519.

94-5703. (11724) Limitation of one year in misdemeanors. An indictment for any misdemeanor must be found, or an information filed or complaint made, within one year after its commission.

History: En. Sec. 1582, Pen. C. 1895; re-en. Sec. 9028, Rev. C. 1907; re-en. Sec. 11724, R. C. M. 1921. Cal. Pen. C. Sec. 801.

Operation and Effect

This is a general statute of limitations, applicable to misdemeanors, and an exception to it cannot be enlarged beyond what its plain language imports, and whenever the exception is invoked the case must clearly and unequivocally fall within it. *State v. Clemens*, 40 M 567, 569, 107 P 896. See *Smith v. Smith*, 224 Fed. 1, 5, 139 C. C. A. 465.

Where a person committed a misdemeanor while within this state and afterwards departed therefrom, an information not filed until one year and ten months after the date of its commission was barred by this section. *State v. Clemens*, 40 M 567, 569, 107 P 896.

Id. The mere fact that a defendant is absent from the state does not constitute any justification or excuse for delay in filing an information against him, particularly in view of the very liberal rules of this state applicable to extradition proceedings.

Under this section, providing that an information for a misdemeanor must be filed within one year after its commission, and under the next section, declaring that if defendant after commission of the offense

Exclusion of time of pendency of prior indictment in computation of limitation. 3 ALR 1330.

Retrospective application of statute of limitations to criminal action already barred. 67 ALR 306.

Limitation of time for prosecution under statute enhancing penalty for second or subsequent offense. 82 ALR 364.

What constitutes concealment which will prevent running of limitations against prosecution for embezzlement. 110 ALR 1000.

Construction and application of phrase "fleeing from justice," or similar phrase, in exception to statutory limitation of time for criminal prosecution after commission of offense. 124 ALR 1049.

Commencement of running of limitations against prosecution for embezzlement. 158 ALR 1158.

Accessories to crimes enumerated in statute of limitations respecting prosecution for criminal offenses, as within contemplation of statute. 160 ALR 395.

leaves the state the information may be filed within the time limited after his return, the time during which he was absent not being part of the limitation, held, that the state's burden of proving that defendant, who had left the state with intention of going to Ireland, was outside the state for a period of at least twenty days was met by testimony a legitimate inference from which was that a trip to Ireland, where defendant visited a number of cities, and return must have involved an absence from the state for at least that length of time. *State v. Knilians*, 69 M 8, 15, 220 P 91.

Defendant was charged with taking and using an automobile without the consent of the owner, under section 94-3305, which makes the offense punishable by fine or imprisonment in the county jail, or by imprisonment in the state penitentiary not exceeding five years. The information was not filed until fourteen months after the commission of the offense. Held, under the rule of this case, that the district court erred in sustaining a demurrer to the pleading on the ground that, the offense being a misdemeanor, the limitation of one year fixed by this section, within which the information could be filed had expired, and holding that it was without jurisdiction to proceed. *State v. Atlas*, 75 M 547, 550 et seq., 244 P 477.

94-5704. (11725) Exception when defendant is out of the state. If, after the offense is committed, the defendant leaves the state or resides out-

side the state, the indictment may be found or an information or complaint filed within the time herein limited, after his coming within the state, and no time during which the defendant is not an inhabitant of or actually a resident within this state is part of the limitation.

History: Ap. p. Sec. 23, p. 221, Bannack Stat.; re-en. Sec. 40, p. 195, Cod. Stat. 1871; re-en. Sec. 40, 3d Div. Rev. Stat. 1879; re-en. Sec. 40, 3d Div. Comp. Stat. 1887; en. Sec. 1583, Pen. C. 1895; re-en. Sec. 9029, Rev. C. 1907; amd. Sec. 1, Ch. 5, L. 1917; re-en. Sec. 11725, R. C. M. 1921. Cal. Pen. C. Sec. 802.

Operation and Effect

For a construction of this section prior to its amendment, see *State v. Clemens*, 40 M 567, 569, 107 P 896.

Under the preceding section, providing that an information for a misdemeanor must be filed within one year after its commission, and under this section, declaring that if defendant after commission of

the offense leaves the state the information may be filed within the time limited after his return, the time during which he was absent not being part of the limitation, held, that the state's burden of proving that defendant who had left the state with the intention of going to Ireland, was outside the state for a period of at least twenty days was met by testimony a legitimate inference from which was that a trip to Ireland, where defendant visited a number of cities, and return must have involved an absence from the state for at least that length of time. *State v. Knilians*, 69 M 8, 15, 220 P 91.

Criminal LawⒸ152.

22 C.J.S. Criminal Law § 229.

94-5705. (11726) Indictment found, when presented and filed. An indictment is found within the meaning of this chapter when it is presented by the grand jury in open court, and there received and filed.

History: En. Sec. 1584, Pen. C. 1895; re-en. Sec. 9030, Rev. C. 1907; re-en. Sec. 11726, R. C. M. 1921. Cal. Pen. C. Sec. 803.

When does limitation commence to run against criminal prosecution for violation of income tax act. 76 ALR 1549.

When statute of limitations begins to run against criminal prosecution for conspiracy. 97 ALR 137.

Criminal LawⒸ157.

22 C.J.S. Criminal Law § 234.

15 Am. Jur. 34, Criminal Law, § 346.

94-5706. (11727) Time not counted. When an indictment, complaint, or information is quashed or set aside, or judgment thereon is reversed, the time during which the same was pending must not be computed as part of the time of the limitation prescribed for the offense.

History: En. Sec. 304, p. 262, Bannack Stat.; re-en. Sec. 460, p. 259, Cod. Stat. 1871; re-en. Sec. 460, 3d Div. Rev. Stat. 1879; re-en. Sec. 462, 3d Div. Comp. Stat. 1887; amd. Sec. 1585, Pen. C. 1895; re-en. Sec. 9031, Rev. C. 1907; re-en. Sec. 11727, R. C. M. 1921.

Criminal LawⒸ160.

22 C.J.S. Criminal Law § 237.

Exclusion of time of pendency of prior indictment in computation of limitation. 3 ALR 1330.

CHAPTER 58

THE COMPLAINT

- Section 94-5801. Complaint must contain what.
 94-5802. Duty to make complaint.
 94-5803. Duty of magistrate.
 94-5804. Arrest without warrant.
 94-5805. Magistrate must issue subpoenas.

94-5801. (11728) Complaint must contain what. The complaint must state:

1. The name of the person accused, if known, or if not known, he may be designated by any other name;

2. The county in which the offense was committed;
3. The general name of the offense;
4. The person against whom, or against whose property, the offense was committed, if known; and,
5. If the offense be against the property of any person, a general description of such property.

The complaint must be subscribed and sworn to by the complainant.

History: Ap. p. Sec. 76, p. 202, Cod. Stat. 1871; re-en. Sec. 76, 3d Div. Rev. Stat. 1879; re-en. Sec. 76, 3d Div. Comp. Stat. 1887; amd. Sec. 1590, Pen. C. 1895; re-en. Sec. 9032, Rev. C. 1907; re-en. Sec. 11728, R. C. M. 1921.

Language of Statute—Bill of Particulars

Ordinarily, an information charging a public offense in the language of the statute is sufficient; if deemed insufficient as to details and facts, the remedy of defendant is by way of a request for a bill of particulars. *State v. Hahn*, 105 M 270, 273, 72 P 2d 459.

Where Offense Incorrectly Named, Not Fatal to Pleading

The general rule is that when the facts, acts and circumstances are set forth with

sufficient certainty to constitute an offense, it is not a fatal defect that the complaint gives the offense an erroneous name; the name of the crime is controlled by the specific acts charged, and an erroneous name of the charge does not vitiate the complaint. *State v. Schnell*, 107 M 579, 585, 88 P 2d 19.

References

Cited or applied as section 9032, Revised Codes, in *State v. Russell*, 52 M 583, 160 P 655.

Criminal Law Ⓒ211 (1-4).

22 C.J.S. Criminal Law §§ 307-311.

4 Am. Jur. 12, Arrest, §§ 12 et seq.

94-5802. (11729) Duty to make complaint. Every person who has reason to believe that a public offense has been committed and that a certain person has committed such offense, must make complaint of such person before a magistrate of the township in which the offense was committed, or if there is no magistrate in such township, before the nearest magistrate.

History: En. Sec. 75, p. 202, Cod. Stat. 1871; re-en. Sec. 75, 3d Div. Rev. Stat. 1879; re-en. Sec. 75, 3d Div. Comp. Stat. 1887; amd. Sec. 1591, Pen. C. 1895; re-en. Sec. 9033, Rev. C. 1907; re-en. Sec. 11729, R. C. M. 1921.

Operation and Effect

The provisions of this section that a person who has reason to believe that a crime has been committed and that a certain person has committed it, must make complaint before a magistrate, does not require one to disclose to a county attorney

evidence within his knowledge tending to disprove the defendant's guilt, and an instruction that it does was erroneous. *State v. Jackson*, 71 M 421, 434, 230 P 370.

References

Cited or applied as section 1591, Penal Code, in *State v. O'Brien*, 35 M 482, 494, 90 P 514; *State ex rel. Vanek v. Justice Court*, 110 M 550, 553, 104 P 2d 14.

Criminal Law Ⓒ210.

22 C.J.S. Criminal Law § 305.

94-5803. (11730) Duty of magistrate. When a complaint is made before a magistrate charging a person with the commission of a public offense, such magistrate must examine the complainant, under oath, as to his knowledge of the commission of the offense charged, and he may also examine any other person. If from such examination, or from any other facts which may lawfully come to the knowledge of the magistrate, it appears to him probable that the alleged offense has been committed within his jurisdiction and that the person accused committed it, such magistrate must immediately issue his warrant for the arrest of such person.

History: Ap. p. Sec. 77, p. 202, Cod. Stat. 1879; amd. Sec. 1, p. 40, L. 1885; Stat. 1871; re-en. Sec. 77, 3d Div. Rev. re-en. Sec. 77, 3d Div. Comp. Stat. 1887;

en. Sec. 1592, Pen. C. 1895; re-en. Sec. 9034, Rev. C. 1907; re-en. Sec. 11730, R. C. M. 1921. Cal. Pen. C. Secs. 811 and 813.

Extent of Examination Before Issuing Warrant

When a complaint is made before a magistrate, of the commission of a public offense, it is his duty under this section to examine the complainant under oath, and others having knowledge of the facts, but it is not contemplated that he shall go into the matter as thoroughly as is required in the trial of the person accused, before issuing a warrant or dismissing the charge. State ex rel. Vanek v. Justice Court, 110 M 550, 554, 104 P 2d 14.

"Probable Cause" Various Defined

"Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of." "It is not essential to probable cause for an arrest that the accuser believe that he has sufficient evidence to procure a conviction." "Probable cause does not depend on the actual state of the case in point of fact, for there may be probable cause for commencing a criminal

prosecution against a party, although subsequent developments may show his absolute innocence." (Not citing this section). State ex rel. Wong You v. District Court, 106 M 347, 352, 78 P 2d 353.

When Mandamus Lies to Compel Magistrate's Disposal

Held, on application for writ of mandamus to compel a justice of the peace to dispose of an accusation brought under sec. 94-1440, prohibiting an appointive state officer from being a member of a political committee, etc., that the writ will issue commanding the justice to take action by either issuing a warrant of arrest or dismissing the complaint where two weeks expired before examination of the accuser and two months in examining six witnesses to ascertain whether a violation was probable or not, but it will not issue to control his discretion, i. e. to issue a warrant of arrest. State ex rel. Vanek v. Justice Court, 110 M 550, 554, 104 P 2d 14.

Criminal Law—212.

22 C.J.S. Criminal Law §§ 303, 317, 319, 320.

Power of justice of peace to take affidavit as basis for warrant of arrest. 16 ALR 923.

94-5804. (11731) Arrest without warrant. When any officer or private person shall bring any person he has arrested, without a warrant, before a magistrate, it is the duty of such officer or person to specify the charge upon which he has made the arrest; it is then the duty of the magistrate or county attorney to make and file a complaint of the offense charged, and cause the officer or person, or some other person, to subscribe and make oath to such complaint; and the proceedings must be the same thereafter as are had in cases where arrests are made under warrant.

History: En. Sec. 1593, Pen. C. 1895; U. S. 332, 343, 87 L. Ed. 819, 63 Sup. Ct. re-en. Sec. 9035, Rev. C. 1907; re-en. Sec. 608. 11731, R. C. M. 1921.

References

State v. Johnson et al., 69 M 38, 44, 220 P 82; McNabb et al. v. United States, 318

Criminal Law—209.

22 C.J.S. Criminal Law § 306.

94-5805. (11732) Magistrate must issue subpoenas. Any person making complaint of a public offense must inform the magistrate of all persons who have any knowledge of the commission of the offense, and the magistrate, at the time of issuing the warrant, must issue subpoenas for each person, requiring them to attend, at a specified time, as witnesses.

History: Ap. p. Sec. 79, p. 203, Cod. re-en. Sec. 9036, Rev. C. 1907; re-en. Sec. Stat. 1871; re-en. Sec. 79, 3d Div. Rev. 11732, R. C. M. 1921. Stat. 1879; re-en. Sec. 79, 3d Div. Comp. Stat. 1887; amd. Sec. 1594, Pen. C. 1895;

Witnesses—8.

70 C.J. Witnesses § 22 et seq.

CHAPTER 59

WARRANT OF ARREST—PROCEEDINGS ON EXECUTION THEREOF

Section 94-5901. Form of warrant.

- 94-5902. Name or description of the defendant in the warrant and statement of the offense.
- 94-5903. Warrant to be directed to and executed by peace officer.
- 94-5904. To what peace officers warrants are to be directed.
- 94-5905. To what peace officers warrants are to be directed—when and how executed in another county—executed by what officers and arrest.
- 94-5906. Officer may arrest in any county.
- 94-5907. Defendant to be taken before the magistrate issuing the warrant, etc.
- 94-5908. Defendant arrested for misdemeanor in another county to be admitted to bail.
- 94-5909. Proceedings on taking bail from the defendant in such cases.
- 94-5910. When bail is not given—when magistrate who issued warrant cannot act.
- 94-5911. When magistrate who issued warrant must act.
- 94-5912. No delay in taking defendant before magistrate.
- 94-5913. Proceedings where defendant is taken before another magistrate.
- 94-5914. Proceedings for offenses triable in another county.
- 94-5915. Duty of officer.
- 94-5916. Admission to bail.
- 94-5917. Officer in charge of prisoner.
- 94-5918. Same.

94-5901. (11733) Form of warrant. A warrant of arrest is an order in writing, in the name of the state, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form:

County of

The State of Montana to any sheriff, constable, marshal, or policeman of said state, or of the county of

Complaint on oath having been this day made before me, by A B, that the crime of (designating it) has been committed, and accusing C D thereof, you are therefore commanded forthwith to arrest the above named C D, and bring him before me at (naming the place), or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at, this day of, nineteen

History: En. Sec. 1600, Pen. C. 1895; When coroner may issue warrant, sec. re-en. Sec. 9037, Rev. C. 1907; re-en. Sec. 94-201-8.
11733, R. C. M. 1921. Cal. Pen. C. Sec. 814.

Cross-References Criminal Law 218 (1-5).
22 C.J.S. Criminal Law §§ 321, 323-326.
Bench warrant, secs. 94-7806 to 94-7808. 4 Am. Jur. 8, Arrest, §§ 7 et seq.

94-5902. (11734) Name or description of the defendant in the warrant and statement of the offense. This warrant must specify the name of the defendant, or, if it is unknown to the magistrate, the defendant may be designated therein by any name. It must also state the time of issuing it, and the county, city, or township where it was issued, and be signed by the magistrate, with his name of office.

History: En. Sec. 1601, Pen. C. 1895;
re-en. Sec. 9038, Rev. C. 1907; re-en. Sec.
11734, R. C. M. 1921. Cal. Pen. C. Sec. 815.

94-5903. (11735) Warrant to be directed to and executed by peace officer. The warrant must be directed to and executed by a peace officer.

History: En. Sec. 1602, Pen. C. 1895;
re-en. Sec. 9039, Rev. C. 1907; re-en. Sec.
11735, R. C. M. 1921. Cal. Pen. C. Sec. 816.

References
Plummer v. Northern Pac. Ry. Co., 79 M
82, 87, 255 P 18.

94-5904. (11736) To what peace officers warrants are to be directed. If a warrant is issued by a justice of the supreme court, or judge of a district

court, it may be directed generally to any sheriff, constable, marshal, or policeman in the state, and may be executed by any of those officers to whom it may be delivered in any part of the state.

History: En. Sec. 1603, Pen. C. 1895; re-en. Sec. 9040, Rev. C. 1907; re-en. Sec. 11736, R. C. M. 1921. Cal. Pen. C. Sec. 818.

38 M 250, 266, 99 P 940; Plummer v. Northern Pac. Ry. Co., 79 M 82, 87, 255 P 18; Brannin v. Sweet Grass Co., 88 M 412, 417, 293 P 970.

References

Cited or applied as section 9040, Revised Codes, in State ex rel. Quintin v. Edwards,

94-5905. (11737) To what peace officers warrants are to be directed—when and how executed in another county—executed by what officers and arrest. If it is issued by any other magistrate it may be directed generally to any sheriff, constable, marshal, or policeman in the county in which it is issued, and may be executed by such officer in any part of the state, and if the complaint, on which the warrant is issued, has been subscribed and sworn to by the county attorney of the county in which it was issued, the warrant may be executed by any of those officers to whom it may be delivered in any part of the state, in which case the arrest may also be made by telegraph in the same manner as provided in sections 94-6017 and 94-6018.

History: En. Sec. 1604, Pen. C. 1895; re-en. Sec. 9041, Rev. C. 1907; re-en. Sec. 11737, R. C. M. 1921; amd. Sec. 1, Ch. 152, L. 1939. Cal. Pen. C. Sec. 819.

Codes, in State ex rel. Quintin v. Edwards, 38 M 250, 266, 99 P 940.

References

Cited or applied as section 9041, Revised

4 Am. Jur. 13, Arrest, § 17 et seq.

Territorial extent of power to arrest under a warrant. 61 ALR 377.

94-5906. (11738) Officer may arrest in any county. Any officer pursuing a person for whom he has a warrant, into another county than the one in which he holds office, may, in the county where he finds such person, call for assistance, and command aid, and exercise authority as if in his own county.

History: En. Sec. 78, p. 202, Cod. Stat. 1871; re-en. Sec. 78, 3d Div. Rev. Stat. 1879; re-en. Sec. 78, 3d Div. Comp. Stat. 1887; re-en. Sec. 1605, Pen. C. 1895; re-en.

Sec. 9042, Rev. C. 1907; re-en. Sec. 11738, R. C. M. 1921.

Arrest ⇨ 66.

6 C.J.S. Arrest § 12.

94-5907. (11739) Defendant to be taken before the magistrate issuing the warrant, etc. If the offense charged is a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate of the same county, as provided in the warrant of arrest.

History: En. Sec. 1606, Pen. C. 1895; re-en. Sec. 9043, Rev. C. 1907; re-en. Sec. 11739, R. C. M. 1921. Cal. Pen. C. Sec. 821.

S. 332, 343, 87 L. Ed. 819, 63 Sup. Ct. 608.

Arrest ⇨ 70.

6 C.J.S. Arrest § 17.

References

McNabb et al. v. United States, 318 U.

94-5908. (11740) Defendant arrested for misdemeanor in another county to be admitted to bail. If the offense charged is a misdemeanor, not within the jurisdiction of the magistrate to punish, and the defendant is arrested in another county, the officer must, upon being required by the de-

defendant, take him before a magistrate in that county, who must admit the defendant to bail, and take bail from him accordingly.

History: En. Sec. 1607, Pen. C. 1895; Arrest↔70; Bail↔42.
 re-en. Sec. 9044, Rev. C. 1907; re-en. Sec. 6 C.J.S. Arrest § 17; 8 C.J.S. Bail
 11740, R. C. M. 1921. Cal. Pen. C. Sec. 822. §§ 34-37.

References

McNabb et al. v. United States, 318 U.
 S. 332, 343, 87 L. Ed. 819, 63 Sup. Ct. 608.

94-5909. (11741) Proceedings on taking bail from the defendant in such cases. On taking the bail, the magistrate must certify that fact on the warrant, and deliver the warrant and undertaking of bail to the officer having charge of the defendant. The officer must then discharge the defendant from arrest, and must, without delay, deliver the warrant and undertaking to the clerk of the court at which the defendant is required to appear.

History: En. Sec. 1608, Pen. C. 1895; Bail↔49.
 re-en. Sec. 9045, Rev. C. 1907; re-en. Sec. 8 C.J.S. Bail §§ 34, 36, 44.
 11741, R. C. M. 1921. Cal. Pen. C. Sec. 823.

94-5910. (11742) When bail is not given—when magistrate who issued warrant cannot act. If, on the admission of the defendant to bail, the bail is not forthwith given, the officer must take the defendant before the magistrate who issued the warrant, or, in case of his absence or inability to act, before the nearest or most accessible magistrate in the same county, and must at the same time deliver to the magistrate the warrant, with his return thereon indorsed and subscribed by him.

History: En. Sec. 1609, Pen. C. 1895;
 re-en. Sec. 9046, Rev. C. 1907; re-en. Sec.
 11742, R. C. M. 1921. Cal. Pen. C. Sec. 824.

94-5911. (11743) When magistrate who issued warrant must act. If the offense charged is within the jurisdiction of the magistrate to try and punish upon conviction, the defendant, if arrested in another county, must be taken before the magistrate who issued the warrant, or, if he is absent, then to some other magistrate, as provided in the next preceding section.

History: En. Sec. 1610, Pen. C. 1895;
 re-en. Sec. 9047, Rev. C. 1907; re-en. Sec.
 11743, R. C. M. 1921.

94-5912. (11744) No delay in taking defendant before magistrate. The defendant must in all cases be taken before the magistrate without unnecessary delay, and any attorney-at-law entitled to practice in courts of record of Montana may, at the request of the prisoner after such arrest, visit the person so arrested.

History: En. Sec. 1611, Pen. C. 1895;
 re-en. Sec. 9048, Rev. C. 1907; re-en. Sec.
 11744, R. C. M. 1921. Cal. Pen. C. Sec. 825.

94-5913. (11745) Proceedings where defendant is taken before another magistrate. If the defendant is brought before a magistrate other than the one who issued the warrant, the complaint on which the warrant was issued must be sent to that magistrate.

History: En. Sec. 1612, Pen. C. 1895; Criminal Law↔233.
 re-en. Sec. 9049, Rev. C. 1907; re-en. Sec. 22 C.J.S. Criminal Law § 340.
 11745, R. C. M. 1921. Cal. Pen. C. Sec. 826.

94-5914. (11746) Proceedings for offenses triable in another county.

When a complaint is made before a magistrate of the commission of a public offense triable in another county of the state, but showing that the defendant is in the county where the complaint is made, the same proceedings must be had as prescribed in this chapter, except that the warrant must require the defendant to be taken before the nearest or most accessible magistrate of the county in which the offense is triable, and the complaint must be delivered by the magistrate to the officer to whom the warrant is delivered.

History: En. Sec. 1613, Pen. C. 1895;
re-en. Sec. 9050, Rev. C. 1907; re-en. Sec.
11746, R. C. M. 1921. Cal. Pen. C. Sec. 827.

94-5915. (11747) Duty of officer. The officer who executes the warrant must take the defendant before the nearest or most accessible magistrate of the county in which the offense is triable, and must deliver to him the complaint and the warrant, with his return indorsed thereon, and the magistrate must then proceed in the same manner as upon a warrant issued by himself.

History: En. Sec. 1614, Pen. C. 1895;
re-en. Sec. 9051, Rev. C. 1907; re-en. Sec.
11747, R. C. M. 1921. Cal. Pen. C. Sec. 828.

94-5916. (11748) Admission to bail. If the offense charged in the warrant issued pursuant to section 94-5914 is a misdemeanor not within the jurisdiction of the magistrate to try and punish, the officer must, upon being required by the defendant, take him before a magistrate of the county in which the warrant was issued, who must admit the defendant to bail, and immediately transmit the warrant and complaint and undertaking to the clerk of the court in which the defendant is required to appear.

History: En. Sec. 1615, Pen. C. 1895;
re-en. Sec. 9052, Rev. C. 1907; re-en. Sec.
11748, R. C. M. 1921. Cal. Pen. C. Sec. 829.

Lien or encumbrance on his real property as affecting qualification of surety on bail bond. 56 ALR 1097.

Arrest 70; Bail 42.

6 C.J.S. Arrest § 17; 8 C.J.S. Bail §§ 34-37.

6 Am. Jur. 51, Bail and Recognizance, § 9 et seq.

Constitutional or statutory provisions regarding release on bail as applicable to children subject to juvenile delinquency act. 160 ALR 287.

94-5917. (11749) Officer in charge of prisoner. An officer who has arrested a defendant on a criminal charge, in any county, may carry such prisoner through such parts of any county or counties as shall be in the ordinary route of travel from the place where the prisoner shall have been arrested, to the place where he is to be conveyed and delivered under the process by which the arrest shall have been made; and such conveyance shall not be deemed an escape.

History: En. Sec. 1616, Pen. C. 1895;
re-en. Sec. 9053, Rev. C. 1907; re-en. Sec.
11749, R. C. M. 1921.

94-5918. (11750) Same. While passing through such other county or counties the officers having the prisoner in their charge shall not be liable to arrest on civil process; and they have the like power to require any citizen to aid in securing such prisoner, and to retake him if he escapes, as if they were within their own county; and a refusal or neglect to render such aid

shall be an offense, in the same manner as if they were officers of the county where such aid shall be required.

History: En. Sec. 1617, Pen. C. 1895; re-en. Sec. 9054, Rev. C. 1907; re-en. Sec. 11750, R. C. M. 1921.

CHAPTER 60

ARRESTS—BY WHOM AND HOW MADE—CLOSE PURSUIT—RETAKEING AFTER ESCAPE

- Section 94-6001. Arrest defined—by whom made.
 94-6002. How an arrest is made and what restraint allowed.
 94-6003. Arrests by peace officers.
 94-6004. Arrests by private persons.
 94-6005. Magistrate may order arrest.
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 94-6007. When the arrest may be made.
 94-6008. Arrest, how made.
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 information to be filed.
 94-6017. Arrest by telegraph.
 94-6018. Same.
 94-6019. Examination of defendant where no other provision is made.
 94-6020. Trial and judgment of misdemeanor.
 94-6021. May be at any time or in any place in the state.
 94-6022. May break open door or window if admittance refused.
 94-6023. Close pursuit—power of arrest by officers of another state.
 94-6024. Hearing as to legality of arrest.
 94-6025. Construction of act.
 94-6026. "State" defined.
 94-6027. Certification of act.
 94-6028. Act, how cited.

94-6001. (11751) Arrest defined—by whom made. An arrest is taking a person into custody in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person.

History: En. Secs. 63, 64, p. 201, Cod. Stat. 1871; re-en. Secs. 63, 64, 3d Div. Rev. Stat. 1879; re-en. Secs. 63, 64, 3d Div. Comp. Stat. 1887; amd. Sec. 1630, Pen. C. 1895; re-en. Sec. 9055, Rev. C. 1907; re-en. Sec. 11751, R. C. M. 1921. Cal. Pen. C. Sec. 834.

Cross-References

Militia members exempt from arrest, sec. 77-158.
 Voters, when privileged from arrest, sec. 23-308.

Operation and Effect

One acting under authority of the county attorney as special investigator of offenses against the narcotic law, who made an arrest without a warrant, held not a "peace officer" within the meaning of

this section, providing that an arrest may be made by a peace officer or a private person in the manner set forth in sections 94-6003 and 94-6004. *State v. Hum Quock*, 89 M 503, 519, 300 P 220.

Arrest—68.

6 C.J.S. Arrest §§ 13-15.

4 Am. Jur. 7, Arrest, §§ 4 et seq.

Degree of force that may be employed in arresting one charged with a misdemeanor. 3 ALR 1170.

Warrant to search as necessary to justify search and seizure incident to lawful arrest. 32 ALR 680.

Necessity of showing warrant upon making arrest under warrant. 40 ALR 62.

Delegation of power by private person to whom warrant of arrest is directed or

power to deputize another to make the arrest. 47 ALR 1089.

Arrest of one released on bail. 62 ALR 462.

Information, belief, or suspicion as to commission of felony, as justification for arrest by private person without warrant. 133 ALR 608.

94-6002. (11752) How an arrest is made and what restraint allowed.

An arrest is made by an actual restraint of the person of the defendant or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention.

History: Ap. p. Sec. 111, p. 234, Bankack Stat.; en. Sec. 71, p. 202, Cod. Stat. 1871; re-en. Sec. 71, 3d Div. Rev. Stat. 1879; re-en. Sec. 71, 3d Div. Comp. Stat. 1887; amd. Sec. 1631, Pen. C. 1895; re-en.

Sec. 9056, Rev. C. 1907; re-en. Sec. 11752, R. C. M. 1921. Cal. Pen. C. Sec. 835.

Warrant to search as necessary to justify search and seizure incident to lawful arrest. 32 ALR 680.

94-6003. (11753) Arrests by peace officers. A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person—

1. For a public offense committed or attempted in his presence;
2. When a person arrested has committed a felony, although not in his presence;
3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it;
4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested;
5. At night, when there is reasonable cause to believe that he has committed a felony.

History: Ap. p. Sec. 66, p. 201, Cod. Stat. 1871; re-en. Sec. 66, 3d Div. Rev. Stat. 1879; re-en. Sec. 66, 3d Div. Comp. Stat. 1887; amd. Sec. 1632, Pen. C. 1895; re-en. Sec. 9057, Rev. C. 1907; re-en. Sec. 11753, R. C. M. 1921. Cal. Pen. C. Sec. 836.

Operation and Effect

The person named in a warrant of arrest must submit even though not guilty of any offense, and the officer, after making his purpose known and exhibiting the warrant, if requested to do so, may use such force as is necessary to effect the arrest without subjecting himself to a charge of trespass. State v. Bradshaw, 53 M 96, 98, 161 P 710.

Id. Where any of the circumstances defined by this section do not exist, an arrest by an officer without warrant constitutes a trespass upon the personal liberty of the one arrested, against which he may use such force as is necessary to prevent the arrest, or to effect his escape, and in a prosecution for resisting an officer it is not sufficient if the officer believed there was a violation of the law, but it must appear that the conditions described in the statute existed.

Under section 3200, R. C. M. 1921, since repealed, the mere possession of narcotics is prima facie evidence of guilt and therefore lack of knowledge, on the part of the

recipient of a package through the mails, that it contained morphine did not render her arrest unlawful, her lack in that respect being a matter of defense at the trial. State v. District Court et al., 82 M 515, 519, 268 P 501.

One acting under authority of the county attorney as special investigator of offenses against the narcotic law, who made an arrest without a warrant, held not a "peace officer" within the meaning of section 94-6001, providing that an arrest may be made by a peace officer or a private person in the manner set forth in this section and the following section. State v. Hum Quock, 89 M 503, 519, 300 P 220.

References

Cited or applied as section 9057, Revised Codes, in Rand v. Butte Electric Ry. Co., 40 M 398, 417, 107 P 87; State ex rel. Neville v. Mullen, 63 M 50, 58, 207 P 634; State ex rel. Merrell v. District Court, 72 M 77, 80, 231 P 1107; State ex rel. Beazley v. District Court, 75 M 116, 120, 241 P 1075.

Arrest—63 (1-4), 65.

6 C.J.S. Arrest §§ 4, 6.

4 Am. Jur. 15, Arrest, §§ 22 et seq.

Constitutionality of statute authorizing arrest without warrant. 1 ALR 585.

Right of peace officer to enter private house or inclosure for purpose of making an arrest without a warrant for a suspected misdemeanor. 26 ALR 286.

Arrest without warrant for driving while intoxicated. 42 ALR 1512.

Right to arrest without a warrant for unlawful possession or transportation of intoxicating liquor. 44 ALR 132.

Arrest without warrant for driving automobile while intoxicated in officer's presence. 49 ALR 1400.

Arrest without warrant on suspicion or information as to unlawful possession of weapons. 92 ALR 490.

94-6004. (11754) Arrests by private persons. A private person may arrest another—

1. For a public offense committed or attempted in his presence;
2. When the person arrested has committed a felony, although not in his presence;
3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

History: En. Sec. 67, p. 201, Cod. Stat. 1871; re-en. Sec. 67, 3d Div. Rev. Stat. 1879; re-en. Sec. 67, 3d Div. Comp. Stat. 1887; amd. Sec. 1633, Pen. C. 1895; re-en. Sec. 9058, Rev. C. 1907; re-en. Sec. 11754, R. C. M. 1921. Cal. Pen. C. Sec. 837.

Operation and Effect

In an action to recover damages for false imprisonment, it is proper to refuse the defendant an instruction to the effect that the law gives a private person the right to make an arrest when the person arrested has committed, or is about to commit, a public offense in his presence, and that, if the jury believes that the plaintiff had taken from the defendant property of the latter which he was attempting to recover at the time of the alleged imprisonment, the verdict should be for the defendant. *Kroeger v. Passmore*, 36 M 504, 510, 93 P 805.

Id. In connection with this section there must also be read section 94-6014, which is a part of the same chapter of the code, relates to the same subject-matter, and may rightly be said to be a limitation upon the provisions of this section.

To entitle a private person to make an arrest under this section, for a public offense committed or attempted in his presence, the facts and circumstances must be such that upon them alone he would be justified in making a complaint upon which a warrant might issue, i. e., the

facts and circumstances must be sufficient to warrant the conclusion that there is probable cause for believing that an offense is being committed. *State ex rel. Sadler v. District Court et al.*, 70 M 378, 386, 225 P 1000.

Id. The authority of a private person to make an arrest without a warrant is more limited than that of an officer to make a like arrest.

In determining whether a private person had "reasonable cause" for believing that a crime had been or was being committed in his presence when he made an arrest, under authority of this section, without a warrant, a liberal rather than a strict course should be followed; if he acted in good faith and the facts and circumstances were such as to warrant a man of prudence and caution in believing as he did when making the arrest, it should be held lawful. *State v. Hum Quoek*, 89 M 503, 519, 300 P 220.

Id. While the legality of an arrest by a private person without a warrant cannot depend upon what is found in the possession of the person arrested, the fact that his belief that a crime was being committed is found to be correct accredits the belief and gives weight to the evidence upon which he acted.

Arrest—64.

6 C.J.S. Arrest § 8.

4 Am. Jur. 24, Arrest, §§ 35-38.

94-6005. (11755) Magistrate may order arrest. A magistrate may orally order a peace officer or private person to arrest any one committing or attempting to commit a public offense in the presence of such magistrate.

History: Ap. p. Sec. 70, p. 202, Cod. Stat. 1871; re-en. Sec. 70, 3d Div. Rev. Stat. 1879; re-en. Sec. 70, 3d Div. Comp. Stat. 1887; amd. Sec. 1634, Pen. C. 1895;

re-en. Sec. 9059, Rev. C. 1907; re-en. Sec. 11755, R. C. M. 1921. Cal. Pen. C. Sec. 838.

Arrest—62.

6 C.J.S. Arrest § 5.

94-6006. (11756) Person making arrest may summon assistance. Any person making an arrest may orally summon as many persons as he deems necessary to aid him therein.

History: En. Sec. 1635, Pen. C. 1895; Arrest 69.
re-en. Sec. 9060, Rev. C. 1907; re-en. Sec. 6 C.J.S. Arrest § 16.
11756, R. C. M. 1921. Cal. Pen. C. Sec. 839.

94-6007. (11757) When the arrest may be made. If the offense charged is a felony, the arrest may be made on any day, and at any time of the day or night. If it is a misdemeanor, the arrest cannot be made at night, unless upon the direction of the magistrate, endorsed upon the warrant.

History: En. Sec. 1636, Pen. C. 1895; 4 Am. Jur. 51, Arrest, § 72.
re-en. Sec. 9061, Rev. C. 1907; re-en. Sec. Time at which arrest is made as affecting its legality or liability for making it. 9 ALR 1350.
11757, R. C. M. 1921. Cal. Pen. C. Sec. 840. Territorial extent of power to arrest under a warrant. 61 ALR 377.

Arrest 67.

6 C.J.S. Arrest § 12.

94-6008. (11758) Arrest, how made. The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape.

History: Ap. p. Sec. 68, p. 201, Cod. Stat. 1871; re-en. Sec. 68, 3d Div. Rev. Stat. 1879; re-en. Sec. 68, 3d Div. Comp. Stat. 1887; en. Sec. 1637, Pen. C. 1895; re-en. Sec. 9062, Rev. C. 1907; re-en. Sec. 11758, R. C. M. 1921. Cal. Pen. C. Sec. 841.

References

Cited or applied as section 9062, Revised Codes, in *State v. Bradshaw*, 53 M 96, 98, 161 P 710.

94-6009. (11759) Warrant must be shown, when. If the person making the arrest is acting under the authority of a warrant, he must show the warrant, if required.

History: En. Sec. 1638, Pen. C. 1895; Necessity of showing warrant upon making arrest under warrant. 40 ALR 62.
re-en. Sec. 9063, Rev. C. 1907; re-en. Sec. 11759, R. C. M. 1921. Cal. Pen. C. Sec. 842.

94-6010. (11760) What force may be used. When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest.

History: Ap. p. Sec. 72, p. 202, Cod. Stat. 1871; re-en. Sec. 72, 3d Div. Rev. Stat. 1879; re-en. Sec. 72, 3d Div. Comp. Stat. 1887; en. Sec. 1639, Pen. C. 1895; re-en. Sec. 9064, Rev. C. 1907; re-en. Sec. 11760, R. C. M. 1921. Cal. Pen. C. Sec. 843.

person to be arrested either flees or forcibly resists, if he unnecessarily assaults him he is criminally liable for such assault. *State v. Prlja*, 57 M 461, 189 P 64.

References

Cited or applied as section 9064, Revised Codes, in *State v. Bradshaw*, 53 M 96, 98, 161 P 710.

Operation and Effect

While, under this section, in making a lawful arrest, the officer may use all necessary means to effect the arrest if the

4 Am. Jur. 52, Arrest, §§ 73 et seq.

94-6011. (11761) Doors and windows may be broken, when. To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him

to be, after having demanded admittance and explained the purpose for which admittance is desired.

History: Ap. p. Sec. 294, p. 261, Ban-nack Stat.; re-en. Sec. 450, p. 258, Cod. Stat. 1871; re-en. Sec. 450, 3d Div. Rev. Stat. 1879; re-en. Sec. 452, 3d Div. Comp. Stat. 1887; en. Sec. 1640, Pen. C. 1895; re-en. Sec. 9065, Rev. C. 1907; re-en. Sec. 11761, R. C. M. 1921. Cal. Pen. C. Sec. 844.

References

State ex rel. Merrell v. District Court, 72 M 77, 81, 231 P 1107.

4 Am. Jur. 58, Arrest, §§ 82 et seq.

Right of peace officer to enter private house or inclosure for purpose of making an arrest without a warrant for a suspected misdemeanor. 26 ALR 286.

94-6012. (11762) Same. Any person who has lawfully entered a house for the purpose of making an arrest may break open the door or window thereof, if detained therein, when necessary for the purpose of liberating himself, and an officer may do the same, when necessary for the purpose of liberating a person who, acting in his aid, lawfully entered for the purpose of making an arrest, and is detained therein.

History: En. Sec. 1641, Pen. C. 1895; re-en. Sec. 9066, Rev. C. 1907; re-en. Sec. 11762, R. C. M. 1921. Cal. Pen. C. Sec. 845.

94-6013. (11763) Weapons may be taken from persons arrested. Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken.

History: En. Sec. 1642, Pen. C. 1895; re-en. Sec. 9067, Rev. C. 1907; re-en. Sec. 11763, R. C. M. 1921. Cal. Pen. C. Sec. 846.

Taking Articles from Arrestee for Use at Trial

When an arrest is lawfully made, the person arresting may take from the posses-

sion of the arrestee articles of property which reasonably would be of use on the trial. State ex rel. Wong You v. District Court, 106 M 347, 351, 78 P 2d 353.

Arrest ⇨ 71.

6 C.J.S. Arrest § 17.

94-6014. (11764) Duty of private person who has made an arrest. A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer.

History: En. Sec. 69, p. 202, Cod. Stat. 1871; re-en. Sec. 69, 3d Div. Rev. Stat. 1879; re-en. Sec. 69, 3d Div. Comp. Stat. 1887; amd. Sec. 1643, Pen. C. 1895; re-en. Sec. 9068, Rev. C. 1907; re-en. Sec. 11764, R. C. M. 1921. Cal. Pen. C. Sec. 847.

Operation and Effect

This section may rightly be said to be a limitation upon the provisions of section 94-6004. Kroeger v. Passmore, 36 M 504, 511, 93 P 805.

Id. In an action to recover damages for false imprisonment, it is proper to refuse the defendant an instruction to the effect that the law gives a private person the

right to make an arrest when the person arrested has committed, or is about to commit, a public offense in his presence, and that, if the jury believes that the plaintiff had taken from the defendant property of the latter which he was attempting to recover at the time of the alleged imprisonment, the verdict should be for the defendant.

References

State v. Hum Quock, 89 M 503, 513, 300 P 220.

4 Am. Jur. 43, Arrest, §§ 65 et seq.

94-6015. (11765) Duty of officer arresting with warrant. An officer making an arrest, in obedience to a warrant, must proceed with the person arrested as commanded by the warrant, or as provided by law.

History: En. Sec. 1644, Pen. C. 1895; re-en. Sec. 9069, Rev. C. 1907; re-en. Sec. 11765, R. C. M. 1921. Cal. Pen. C. Sec. 848.

94-6016. (11766) Person arrested without a warrant to be taken before a magistrate—information to be filed. When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint, stating the charge against the person, must be made before such magistrate.

History: En. Sec. 1645, Pen. C. 1895; re-en. Sec. 9070, Rev. C. 1907; re-en. Sec. 11766, R. C. M. 1921. Cal. Pen. C. Sec. 849.

Damages for False Imprisonment

In an action against a sheriff and the surety on his official bond for false imprisonment after arrest without a warrant, based on officer's failure to take plaintiff before a committing magistrate or judicial officer, involving also transportation by federal postal inspectors to neighboring county and interpretation of Sec. 591 Title 18 U. S. C. A., held, that evidence sufficient to show prima facie case of such imprisonment, but remanded for new trial unless plaintiff consents to reduction of damages. *Cline v. Tait*, 116 M 571, 574, 155 P 2d 752.

Id. Effect of subsequent conviction in determining actual damages and excessiveness of verdict.

Search and Seizure Without Warrant

An officer may make a search and seizure without a warrant when he has probable cause to believe that an offense is being committed. *State ex rel. Wong You v. District Court*, 106 M 347, 352, 78 P 2d 353.

What Does Not Constitute Unnecessary Delay

In an action against a sheriff and the surety on his official bond for false imprisonment because of failure to take the arrested person before a magistrate as re-

quired by this section, held, that in the state of the record, the jury could not properly conclude that a delay to nine o'clock in the morning was unreasonable under the provisions of sec. 25-306, fixing the hours for certain justices of the peace. *Cline v. Tait*, 113 M 475, 484, 129 P 2d 89.

When Officer May Arrest Without Warrant

The utmost that can be exacted of the officer who arrests without a warrant is that the circumstances shall be such that upon them alone he would be justified in making a complaint upon which a warrant might issue; if the circumstances are such that he could properly secure a warrant he may arrest without a warrant if the offense was committed in his presence; and it is settled that the officer need not have actual, personal knowledge of the facts which constitute the offense in order to be able to make complaint and secure a warrant. *State ex rel. Wong You v. District Court*, 106 M 347, 352, 78 P 2d 353.

When Search and Seizure Unreasonable

An arrest, or search and seizure, made without a warrant is illegal and, therefore, unreasonable when it is made upon mere suspicion or belief unsupported by facts, circumstances or credible information calculated to produce such belief. *State ex rel. Wong You v. District Court*, 106 M 347, 354, 78 P 2d 353.

94-6017. (11767) Arrest by telegraph. A justice of the supreme court, or a judge of the district court, may, by an indorsement under his hand upon a warrant of arrest, authorize the service thereof by telegraph, and thereafter a telegraphic copy of such warrant may be sent by telegraph to one or more peace officers; and such copy is as effectual in the hands of any officer, and he must proceed in the same manner under it, as though he held an original warrant issued by the magistrate making the indorsement thereon.

History: En. Sec. 1646, Pen. C. 1895; re-en. Sec. 9071, Rev. C. 1907; re-en. Sec. 11767, R. C. M. 1921. Cal. Pen. C. Sec. 850.

Criminal Law—218 (1).

22 C.J.S. Criminal Law § 321.

94-6018. (11768) Same. Every officer causing telegraphic copies of warrants to be sent must certify as correct, and file in the telegraph office from which such copies are sent, a copy of the warrant and indorsement thereon, and must return the original with a statement of his action thereunder.

History: En. Sec. 1647, Pen. C. 1895;

re-en. Sec. 9072, Rev. C. 1907; re-en. Sec. 11768, R. C. M. 1921. Cal. Pen. C. Sec. 851.

94-6019. (11769) Examination of defendant where no other provision is made. Every person arrested by warrant for any offense, where no other provision is made for his examination, must be brought before some magistrate of the county in which the warrant was issued, and the warrant, with the proper return thereon, signed by the person who made the arrest, must be delivered to such magistrate.

History: En. Sec. 1648, Pen. C. 1895; Criminal Law 223.
re-en. Sec. 9073, Rev. C. 1907; re-en. Sec. 22 C.J.S. Criminal Law § 332.
11769, R. C. M. 1921.

94-6020. (11770) Trial and judgment of misdemeanor. If the offense charged is a misdemeanor within the jurisdiction of the magistrate to try and render judgment therein, a trial must be had as provided by sections 94-100-1 to 94-100-46.

History: En. Sec. 1649, Pen. C. 1895; Criminal Law 249.
re-en. Sec. 9074, Rev. C. 1907; re-en. Sec. 22 C.J.S. Criminal Law § 368.
11770, R. C. M. 1921.

94-6021. (11771) May be at any time or in any place in the state. If a person arrested escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and retake him at any time and in any place within the state.

History: En. Sec. 74, p. 202, Cod. Stat. Arrest 72.
1871; re-en. Sec. 74, 3d Div. Rev. Stat. 6 C.J.S. Arrest § 19.
1879; re-en. Sec. 74, 3d Div. Comp. Stat. 4 Am. Jur. 30, Arrest, § 44.
1887; re-en. Sec. 1660, Pen. C. 1895; re-en.
Sec. 9075, Rev. C. 1907; re-en. Sec. 11771,
R. C. M. 1921. Cal. Pen. C. Sec. 854.

94-6022. (11772) May break open door or window if admittance refused. To retake the person escaping or rescued, the person pursuing may break open any outer or inner door or window of a dwelling-house, if, after notice of his intention, he is refused admittance.

History: En. Sec. 1661, Pen. C. 1895; 4 Am. Jur. 58, Arrest, §§ 82 et seq.
re-en. Sec. 9076, Rev. C. 1907; re-en. Sec.
11772, R. C. M. 1921. Cal. Pen. C. Sec. 855.

94-6023. Close pursuit—power of arrest by officers of another state. Any peace officer of another state of the United States, who enters this state in close pursuit and continues within this state in such close pursuit of a person in order to arrest him, shall have the same authority to arrest and hold in custody such person, as peace officers of this state have to arrest and hold in custody a person on the ground that he has committed a crime in this state.

History: En. Sec. 1, Ch. 187, L. 1937. Arrest 63 (3).
6 C.J.S. Arrest § 6.

94-6024. Hearing as to legality of arrest. If an arrest is made in this state by an officer of another state in accordance with the provisions of section 94-6023, he shall, without unnecessary delay, take the person arrested before a judge of a court of record who shall conduct a hearing for the sole purpose of determining if the arrest was in accordance with the provisions of section 94-6023, and not of determining the guilt or innocence of the arrested person. If the judge determines that the arrest was in accordance with such provisions, he shall commit the person arrested to the custody of

the officer making the arrest, who shall without unnecessary delay take him to the state from which he fled. If the judge determines that the arrest was unlawful, he shall discharge the person arrested.

History: En. Sec. 2, Ch. 187, L. 1937.

94-6025. Construction of act. Section 94-6023 shall not be construed so as to make unlawful any arrest in this state which would otherwise be unlawful.

History: En. Sec. 3, Ch. 187, L. 1937.

94-6026. "State" defined. For the purpose of this act the word state shall include the District of Columbia.

History: En. Sec. 4, Ch. 187, L. 1937.

94-6027. Certification of act. Upon the passage and approval by the governor of this act, it shall be the duty of the secretary of the state (or other officer) to certify a copy of this act to the executive department of each of the states of the United States.

History: En. Sec. 5, Ch. 187, L. 1937.

94-6028. Act, how cited. This act may be cited as the Uniform Act on Close Pursuit.

History: En. Sec. 7, Ch. 187, L. 1937.

CHAPTER 61

EXAMINATION AND COMMITMENT OR DISCHARGE OF DEFENDANT

- Section 94-6101. Magistrate to inform the defendant of the charge and his right to counsel.
 94-6102. Time to send and sending for counsel.
 94-6103. Examination, when to proceed.
 94-6104. On postponement, defendant to be committed or discharged on bail.
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 94-6123. Witness unable to give security may be conditionally examined—not applicable to prosecutor or accomplice.
 94-6124. Magistrate to return testimony, etc., to the court.
 94-6125. Waiver of examination.

94-6101. (11773) Magistrate to inform the defendant of the charge and his right to counsel. When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having com-

mitted a public offense, the magistrate must immediately inform him of the charge against him, which charge must be by complaint as provided in this code, made before the examination in this chapter provided for, and of his right to the aid of counsel in every stage of the proceedings.

History: Ap. p. Sec. 90, p. 204, Cod. Criminal Law 231.
 Stat. 1871; re-en. Sec. 90, 3d Div. Rev. 22 C.J.S. Criminal Law §§ 302, 338.
 Stat. 1879; re-en. Sec. 90, 3d Div. Comp. 14 Am. Jur. 933, Criminal Law, §§ 240
 Stat. 1887; en. Sec. 1670, Pen. C. 1895; et seq.
 re-en. Sec. 9077, Rev. C. 1907; re-en. Sec.
 11773, R. C. M. 1921. Cal. Pen. C. Sec. 858.

94-6102. (11774) Time to send and sending for counsel. The magistrate must allow the defendant a reasonable time to send for counsel, and postpone the examination for that purpose; and must, upon request of the defendant, require a peace officer to take a message to any counsel, in the township or city, the defendant may name. The officer must, without delay and without fee, perform that duty.

History: En. Sec. 1671, Pen. C. 1895;
 re-en. Sec. 9078, Rev. C. 1907; re-en. Sec.
 11774, R. C. M. 1921. Cal. Pen. C. Sec. 859.

94-6103. (11775) Examination, when to proceed. If the defendant requires the aid of counsel, the magistrate must, immediately after the appearance of counsel, or if, after waiting a reasonable time therefor, none appears, proceed to examine the case.

History: En. Sec. 1672, Pen. C. 1895; Criminal Law 228.
 re-en. Sec. 9079, Rev. C. 1907; re-en. Sec. 22 C.J.S. Criminal Law § 335.
 11775, R. C. M. 1921. Cal. Pen. C. Sec. 860.

94-6104. (11776) On postponement, defendant to be committed or discharged on bail. A magistrate may adjourn an examination or trial pending before him from time to time, as occasion may require, not exceeding ten days at one time, without the consent of the person charged, and to the same or a different place in the county, as he may think proper; and in such case if the party is charged with a capital offense, he must be committed in the meantime, otherwise the magistrate must commit the defendant for examination, admit him to bail, or discharge him from custody upon the deposit of money, as provided in this code, as security for his appearance at the time to which the examination is postponed.

History: Ap. p. Sec. 33, p. 223, Ban- re-en. Sec. 9080, Rev. C. 1907; re-en. Sec.
 nack Stat.; re-en. Sec. 86, p. 204, Cod. 11776, R. C. M. 1921. Cal. Pen. C. Sec. 861.
 Stat. 1871; re-en. Sec. 86, 3d Div. Rev.
 Stat. 1879; re-en. Sec. 86, 3d Div. Comp.
 Stat. 1887; amd. Sec. 1673, Pen. C. 1895; References
 Hassan v. Earll, 61 M 389, 393, 202 P
 581.

94-6105. (11777) Form of commitment. The commitment for examination is made by an indorsement, signed by the magistrate on the warrant of arrest, to the following effect: "The within-named A B, having been brought before me under this warrant, is committed for examination to the sheriff of". If the sheriff is not present, the defendant may be committed to the custody of a peace officer.

History: En. Sec. 1674, Pen. C. 1895;
 re-en. Sec. 9081, Rev. C. 1907; re-en. Sec.
 11777, R. C. M. 1921. Cal. Pen. C. Sec. 863.

94-6106. (11778) Magistrate must issue subpoenas. The magistrate must issue subpoenas for witnesses within the state required either for the prosecution or for the defense.

History: En. Sec. 1675, Pen. C. 1895; Criminal Law 234.
re-en. Sec. 9082, Rev. C. 1907; re-en. Sec. 22 C.J.S. Criminal Law § 340.
11778, R. C. M. 1921. Cal. Pen. C. Sec. 864.

94-6107. (11779) Examination of witnesses to be in presence of defendant. The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf.

History: En. Sec. 1676, Pen. C. 1895;
re-en. Sec. 9083, Rev. C. 1907; re-en. Sec.
11779, R. C. M. 1921. Cal. Pen. C. Sec. 865.

94-6108. (11780) Examination of defendant's witnesses. When the examination of witnesses on the part of the state is closed, any witnesses the defendant may produce must be sworn and examined.

History: En. Sec. 1677, Pen. C. 1895;
re-en. Sec. 9084, Rev. C. 1907; re-en. Sec.
11780, R. C. M. 1921. Cal. Pen. C. Sec. 866.

94-6109. (11781) Exclusion and separation of witnesses. While a witness is under examination, the magistrate may exclude all witnesses who have not been examined. He may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined.

History: En. Sec. 1678, Pen. C. 1895;
re-en. Sec. 9085, Rev. C. 1907; re-en. Sec.
11781, R. C. M. 1921. Cal. Pen. C. Sec. 867.

94-6110. (11782) Who may be present at the examination. The magistrate must also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney general, the county attorney of the county, the defendant and his counsel, and the officer having the defendant in custody.

History: En. Sec. 1679, Pen. C. 1895; Criminal Law 230.
re-en. Sec. 9086, Rev. C. 1907; re-en. Sec. 22 C.J.S. Criminal Law § 337.
11782, R. C. M. 1921. Cal. Pen. C. Sec. 868.

94-6111. (11783) Reduction to writing and authentication of testimony. The testimony of each witness, in case of homicide, must be reduced to writing, as a deposition, by a stenographer appointed by the county attorney, under the direction of the magistrate; and in other cases the testimony of each witness shall be taken by a stenographer appointed by the county attorney upon demand of the prosecuting attorney, or the defendant, or his counsel. The deposition or testimony of the witness must be authenticated in the following form:

1. It must state name of the witness, his place of residence, and his business or profession.
2. It must contain the questions put to the witness, and his answers thereto, each answer being distinctly read to him as it is taken down, and being corrected or added to until it conforms to what he declares is the truth.

3. If the question put be objected to on either side and overruled, or the witness decline answering it, that fact, with the ground on which the question was overruled or the answer declined, must be stated.

4. The deposition must be signed by the witness, or, if he refuses to sign it, his reason for refusing must be stated in writing as he gives it.

5. It must be signed and certified by the magistrate when reduced to writing by him, or under his direction, and certified as being a correct statement of such testimony and proceedings in the case, and shall be *prima facie* a correct statement of such testimony and proceedings.

The deposition or testimony of the witness must be authenticated in the manner and form provided in this section.

History: En. Sec. 1680, Pen. C. 1895; re-en. Sec. 9087, Rev. C. 1907; amd. Sec. 1, Ch. 8, L. 1919; re-en. Sec. 11783, R. C. M. 1921. Cal. Pen. C. Sec. 869.

References

Hawley v. Richardson, 60 M 118, 126, 198 P 450; In re Hyde, 73 M 363, 366, 236 P 248.

Criminal Law ⚡ 236.

22 C.J.S. Criminal Law §§ 340-343.

14 Am. Jur. 938, Criminal Law, § 246.

94-6112. (11784) Testimony, by whom and how kept. The magistrate or his clerk must keep the testimony taken on the examination until it is returned to the proper court; and must not permit such testimony to be examined or copied by any person except a judge of a court having jurisdiction of the offense or authorized to issue writs of habeas corpus, the attorney general, county attorney, or other prosecuting attorney, and the defendant and his counsel.

History: En. Sec. 1681, Pen. C. 1895; re-en. Sec. 9088, Rev. C. 1907; re-en. Sec. 11784, R. C. M. 1921. Cal. Pen. C. Sec. 870.

94-6113. (11785) Defendant, when and how discharged. If, after hearing the proofs, it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate must order the defendant discharged, by an indorsement on the testimony or warrant signed by him, to the following effect: "There being no sufficient cause to believe the within-named A B guilty of the offense within mentioned, I order him to be discharged."

History: Ap. p. Sec. 40, p. 224, Ban-nack Stat.; amd. Sec. 116, p. 208, Cod. Stat. 1871; re-en. Sec. 116, 3d Div. Rev. Stat. 1879; re-en. Sec. 116, 3d Div. Comp. Stat. 1887; amd. Sec. 1682, Pen. C. 1895; re-en. Sec. 9089, Rev. C. 1907; re-en. Sec. 11785, R. C. M. 1921. Cal. Pen. C. Sec. 871.

charge of grand larceny was the indorsement on the warrant on which he was arrested, and not the entries on the magistrate's docket; but, upon proof of the loss of the warrant, parol evidence was admissible to prove the fact of his discharge. Hawley v. Richardson, 60 M 118, 126, 198 P 450.

Operation and Effect

The best evidence of plaintiff's discharge after preliminary examination on a

Criminal Law ⚡ 239.

22 C.J.S. Criminal Law § 347.

94-6114. (11786) When and how to be committed. If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the testimony or warrant an order, signed by him, to the following effect: "It appearing to me that the offense in the

within testimony mentioned (or any offense, according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within-named A B guilty thereof, I order that he be held to answer to the same."

History: Ap. p. Secs. 114, 115, p. 207, Cod. Stat. 1871; re-en. Secs. 114, 115, 3d Div. Rev. Stat. 1879; re-en. Secs. 114, 115, 3d Div. Comp. Stat. 1887; amd. Sec. 1683, Pen. C. 1895; re-en. Sec. 9090, Rev. C. 1907; re-en. Sec. 11786, R. C. M. 1921. Cal. Pen. C. Sec. 872.

Operation and Effect

On a preliminary examination, all that is required of the county attorney is to submit proof sufficient to show probable

cause to believe the defendant to be guilty of the charge. In re Jones, 46 M 122, 126, 126 P 929.

References

Robinson v. Gordon, 61 M 124, 129, 201 P 573.

Criminal Law 240.

22 C.J.S. Criminal Law § 348.

14 Am. Jur. 939, Criminal Law, § 248.

94-6115. (11787) Order for commitment. If the offense is not bailable, the following words must be added to the indorsement: "And he is hereby committed to the sheriff of the county of"

History: En. Sec. 1684, Pen. C. 1895; re-en. Sec. 9091, Rev. C. 1907; re-en. Sec. 11787, R. C. M. 1921. Cal. Pen. C. Sec. 873.

Criminal Law 241.

22 C.J.S. Criminal Law §§ 350-352.

94-6116. (11788) Order for bail on commitment. If the offense is bailable, and the defendant is admitted to bail, the following words must be added to the order: "And that he be admitted to bail in the sum of dollars, and is committed to the sheriff of the county of until he gives such bail."

History: En. Sec. 1685, Pen. C. 1895; re-en. Sec. 9092, Rev. C. 1907; re-en. Sec. 11788, R. C. M. 1921. Cal. Pen. C. Sec. 875.

Bail 49.

8 C.J.S. Bail §§ 34, 36, 44.

94-6117. (11789) Commitment, how made and to whom delivered. If the magistrate order the defendant to be committed, he must make out a commitment, signed by him, with his name of office, and deliver it, with the defendant, to the officer to whom he is committed, or, if that officer is not present, to a peace officer, who must deliver the defendant into the proper custody, together with the commitment.

History: En. Sec. 1686, Pen. C. 1895; re-en. Sec. 9093, Rev. C. 1907; re-en. Sec. 11789, R. C. M. 1921. Cal. Pen. C. Sec. 876.

94-6118. (11790) Form of commitment. The commitment must be to the following effect:

County of (as the case may be).

The State of Montana to the sheriff of the county of

An order having been this day made by me that A B be held to answer upon a charge of (stating briefly the nature of the offense, and giving, as near as may be, the time when and the place where the same was committed), you are hereby commanded to receive him into your custody and detain him until he is legally discharged.

Dated this day of, nineteen.....

History: En. Sec. 1687, Pen. C. 1895; re-en. Sec. 9094, Rev. C. 1907; re-en. Sec. 11790, R. C. M. 1921. Cal. Pen. C. Sec. 877.

References

Folsom v. Fisco et al., 62 M 194, 200, 204 P 367.

94-6119. (11791) Undertaking of witness to appear. On holding the defendant to answer, the magistrate may take from each of the material witnesses examined before him on the part of the state, a written undertaking, to the effect that he will appear and testify at the court to which the complaint and statements are to be sent, or that he will forfeit the sum of five hundred dollars.

History: Ap. p. Sec. 43, p. 225, Bannack Stat.; re-en. Sec. 99, p. 205, Cod. Stat. 1871; re-en. Sec. 99, 3d Div. Rev. Stat. 1879; re-en. Sec. 99, 3d Div. Comp. Stat. 1887; amd. Sec. 1688, Pen. C. 1895; re-en. Sec. 9095, Rev. C. 1907; re-en. Sec. 11791, R. C. M. 1921. Cal. Pen. C. Sec. 878.

References

Cited or applied as section 99, Third Division Compiled Statutes 1887, in *State v. McHatton*, 10 M 370, 25 P 1046.

Witnesses \Rightarrow 19.

70 C.J. Witnesses § 59. et seq.

94-6120. (11792) Security for the appearance of witnesses. When the magistrate or judge of the court in which the action is pending is satisfied, by proof on oath, that there is reason to believe that any such witness will not appear and testify unless security is required, he may order the witness to enter into a written undertaking, with sureties, in such sum as he may deem proper, for his appearance as specified in the preceding section.

History: Ap. p. Sec. 44, p. 225, Bannack Stat.; re-en. Sec. 100, p. 205, Cod. Stat. 1871; re-en. Sec. 100, 3d Div. Rev. Stat. 1879; re-en. Sec. 100, 3d Div. Comp.

Stat. 1887; amd. Sec. 1689, Pen. C. 1895; re-en. Sec. 9096, Rev. C. 1907; re-en. Sec. 11792, R. C. M. 1921. Cal. Pen. C. Sec. 879.

94-6121. (11793) Infants and married women may be required to give security. When any married woman or minor is a material witness, any other person may be allowed to give an undertaking for the appearance of such witness; or the magistrate may, in his discretion, take the undertaking of such married woman or minor in a sum not exceeding fifty dollars, which is valid and binding in law, notwithstanding the disability of coverture or minority.

History: En. Sec. 45, p. 225, Bannack Stat.; re-en. Sec. 101, p. 206, Cod. Stat. 1871; re-en. Sec. 101, 3d Div. Rev. Stat. 1879; re-en. Sec. 101, 3d Div. Comp. Stat.

1887; amd. Sec. 1690, Pen. C. 1895; re-en. Sec. 9097, Rev. C. 1907; re-en. Sec. 11793, R. C. M. 1921. Cal. Pen. C. Sec. 880.

94-6122. (11794) Witnesses to be committed on refusal to give security for their appearance—how discharged. Any witness required to enter into an undertaking, either with or without sureties must, if he refuse, be committed to prison by the magistrate, there to remain until the deposition of such witness can be taken. After the deposition is taken the witness must be immediately discharged.

History: En. Sec. 46, p. 225, Bannack Stat.; re-en. Sec. 102, p. 206, Cod. Stat. 1871; re-en. Sec. 102, 3d Div. Rev. Stat. 1879; re-en. Sec. 102, 3d Div. Comp. Stat.

1887; amd. Sec. 1691, Pen. C. 1895; re-en. Sec. 9098, Rev. C. 1907; re-en. Sec. 11794, R. C. M. 1921. Cal. Pen. C. Sec. 881.

94-6123. (11795) Witness unable to give security may be conditionally examined—not applicable to prosecutor or accomplice. Such deposition must be taken in the presence of the accused and his counsel, or without their presence if they fail to attend the examination after reasonable notice of the time and place thereof, upon written notice to the defendant or his attorney, or the attorney prosecuting, as the case may be, and the deposition so taken must be transmitted to the clerk of the district court and may

be used on the trial in the district court subject to objections as to the materiality or competency of the evidence as in case of other depositions, if the witness be dead or absent from the state at the time of the trial.

History: En. Sec. 1692, Pen. C. 1895; Depositions⇨11.
re-en. Sec. 9099, Rev. C. 1907; re-en. Sec. 26 C.J.S. Depositions §§ 5, 6.
11796, R. C. M. 1921. Cal. Pen. C. Sec. 882.

94-6124. (11796) Magistrate to return testimony, etc., to the court.

When a magistrate has discharged a defendant, or has held him to answer, he must return, without delay, to the clerk of the court at which the defendant is required to appear, the complaint, testimony, and warrant, if any, and all undertakings of bail, or for the appearance of witnesses, taken by him.

History: Ap. p. Sec. 110, p. 207, Cod. Stat. 1871; re-en. Sec. 110, 3d Div. Rev. Stat. 1879; re-en. Sec. 110, 3d Div. Comp. Stat. 1887; en. Sec. 1693, Pen. C. 1895; re-en. Sec. 9100, Rev. C. 1907; re-en. Sec. 11796, R. C. M. 1921. Cal. Pen. C. Sec. 883.

References

Cited or applied as section 1693, Penal Code, in *State v. Lagoni*, 30 M 472, 479, 76 P 1044.

Criminal Law⇨244.

22 C.J.S. Criminal Law §§ 363, 364.

94-6125. (11797) Waiver of examination. A defendant brought before a committing magistrate may waive a preliminary examination. In such cases the magistrate must make a minute of such waiver, and make the same order as though he had found that there was probable cause for believing the defendant guilty of the offense charged.

History: En. Sec. 111, p. 207, Cod. Stat. 1871; re-en. Sec. 111, 3d Div. Rev. Stat. 1879; re-en. Sec. 111, 3d Div. Comp. Stat. 1887; amd. Sec. 1694, Pen. C. 1895; re-en. Sec. 9101, Rev. C. 1907; re-en. Sec. 11797, R. C. M. 1921.

Criminal Law⇨225.

22 C.J.S. Criminal Law §§ 332, 333.

14 Am. Jur. 935, Criminal Law, §§ 242-244.

CHAPTER 62

PRELIMINARY PROVISIONS—FILING THE INFORMATION

- Section 94-6201. Offenses, how prosecuted.
94-6202. What by accusation or information.
94-6203. Indictments and accusations, in what court found.
94-6204. Information to be filed.
94-6205. Duty of county attorney.
94-6206. Duty of court when county attorney does not file information.
94-6207. Information may be amended.
94-6208. Indorsement on information.

94-6201. (11798) Offenses, how prosecuted. All public offenses triable in the district courts must be prosecuted by indictment or information, except as provided in the next section.

History: En. Sec. 1720, Pen. C. 1895; re-en. Sec. 9102, Rev. C. 1907; re-en. Sec. 11798, R. C. M. 1921. Cal. Pen. C. Sec. 888.

with the filing of the information or indictment, and not before. *Rosebud County v. Flinn*, 109 M 537, 541, 98 P 2d 330.

Extent of the Term "Prosecution"

Apparently only one construction can be given to art. III, sec. 8, art. VIII, sec. 27 of the constitution of Montana, and this section, appearing to have defined the meaning of the term "prosecution", namely, that the prosecution commences

References

State v. District Court, 61 M 558, 563, 202 P 756.

Indictment and Information⇨1.

42 C.J.S. Indictments and Informations §§ 1, 4, 15.

94-6202. (11799) What by accusation or information. When the proceedings are had for the removal of district, county, municipal, or township officers, they may be commenced by an accusation or information, in writing, as provided in sections 94-5502 and 94-5516.

History: En. Sec. 1721, Pen. C. 1895; re-en. Sec. 9103, Rev. C. 1907; re-en. Sec. 11799, R. C. M. 1921. Cal. Pen. C. Sec. 889.

References

State v. District Court, 61 M 558, 563, 202 P 756.

Officers^③74.

46 C.J. Officers § 178 et seq.

94-6203. (11800) Indictments and accusations, in what court found. All accusations, informations, or indictments against district, county, municipal, and township officers, must be found or filed in the district court.

History: En. Sec. 1722, Pen. C. 1895; re-en. Sec. 9104, Rev. C. 1907; re-en. Sec. 11800, R. C. M. 1921. Cal. Pen. C. Sec. 890.

94-6204. (11801) Information to be filed. When the defendant has been examined and committed, or admitted to bail, as provided in this code, or upon leave of court, the county attorney must, within thirty days after the delivery of the complaint, warrant, and testimony to the proper district court, or after such leave, file in such court an information charging the defendant with the offense for which he is held to answer, or any other offense disclosed by the testimony. In case the county attorney fails to file the information within the time specified he is guilty of contempt, and may be prosecuted for neglect of duty as in other cases.

History: En. Sec. 2, p. 249, L. 1891; amd. Sec. 1730, Pen. C. 1895; re-en. Sec. 9105, Rev. C. 1907; re-en. Sec. 11801, R. C. M. 1921. Cal. Pen. C. Sec. 809.

defendant's bail-bond. State v. Lagoni, 30 M 472, 480, 76 P 1044.

Operation and Effect

Under this section and the two following sections, no leave of court is necessary to file an information after commitment on preliminary examination, and a writ of supervisory control will not issue to compel the granting of leave. State ex rel. Donovan v. District Court, 26 M 275, 278, 67 P 943.

Id. Under this section and the two following sections, leave to file an information without a preliminary examination may be granted or refused, within the sound discretion of the court, when no statement is made to the court of the evidence upon which the state relies for a conviction, and a writ of supervisory control to revise such discretion will be denied.

Where the county attorney fails to comply with this section, any advantage thereof must be taken by defendant by motion to set aside the information, which must be done before demurrer or plea, and failure to so take advantage of the irregularity waives it. The negligence of the county attorney in this respect cannot be taken advantage of by the sureties on de-

The objection that an information was filed, without leave of court, more than thirty days after the committing magistrate had lodged the papers with the clerk of the district court, must be made in writing and before demurrer or plea, or it is waived; hence, where defendant did not raise such an objection to the jurisdiction of the court until after plea, and then orally, he was not in a position to complain of the action of the court in overruling his objection. State v. Chevigny, 48 M 382, 384, 138 P 257.

Showing Necessary to Obtain Leave to File

The matter of obtaining leave to file an information, without a previous examination of the accused by a committing magistrate, is authorized by both constitution and statute; it is not to be considered as a merely perfunctory one, and though the county attorney is not required to support the application by affidavit or set forth therein the facts constituting the charge with technical accuracy, the showing must be sufficient to move the discretion of the court. In instant case, held that the motion must be complete in itself and not dependent on any former information which has become functus officio and

not "as charged in the information as originally filed". State ex rel. Juhl v. District Court, 107 M 309, 316, 84 P 2d 979.

References

Cited or applied before amendment as section 2, p. 249, Session Laws 1891, in State v. Smith, 12 M 378, 30 P 679; as section 1730, Penal Code, in State v. Brett,

16 M 360, 366, 40 P 873; State v. Bowser, 21 M 133, 136, 53 P 179; State v. Vuckovich, 61 M 480, 491, 203 P 491; State v. Tesla et al., 69 M 503, 508, 223 P 107.

Indictment and Information—39.

42 C.J.S. Indictments and Informations §§ 67, 70-72.

94-6205. (11802) Duty of county attorney. The county attorney of the proper county must inquire into and make full examination of all facts and circumstances, touching the commission of any public offense, whenever the offender has been held to answer, and must file an information setting forth the crime committed, according to the facts ascertained on such examination and from the written testimony taken thereon, whether it be the offense charged in the complaint on which the examination was held or not.

History: Ap. p. Sec. 2, p. 249, L. 1891; en. Sec. 1731, Pen. C. 1895; re-en. Sec. 9106, Rev. C. 1907; re-en. Sec. 11802, R. C. M. 1921.

Probable Cause, Various Defined

"Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of." "It is not essential to probable cause for

an arrest that the accuser believe that he has sufficient evidence to procure a conviction." "Probable cause does not depend on the actual state of the case in point of fact, for there may be probable cause for commencing a criminal prosecution against a party, although subsequent developments may show his absolute innocence." (Not citing this section). State ex rel. Wong You v. District Court, 106 M 347, 352, 78 P 2d 353.

94-6206. (11803) Duty of court when county attorney does not file information. If the county attorney determines in any such case than an information ought not to be filed, he must make, subscribe, and file with the clerk of the court a statement in writing containing his reasons in fact and in law for not filing an information in such case; such statement must be filed at and during the term or session of the court to which the offender is held to appear for trial; and in such case the court must examine such statement together with the evidence filed in the case, and if upon such examination the court is not satisfied with such statement, the county attorney must be directed and required by the court to file the proper information and bring the case to trial.

History: En. Sec. 2, p. 249, L. 1891; amd. Sec. 1732, Pen. C. 1895; re-en. Sec. 9107, Rev. C. 1907; re-en. Sec. 11803, R. C. M. 1921.

References

Cited or applied as section 1732, Penal Code, in State ex rel. Donovan v. District Court, 26 M 275, 278, 67 P 943; as section 9107, Revised Codes, in State v. Chevigny, 48 M 382, 384, 138 P 257.

94-6207. (11804) Information may be amended. An information may be amended in matter of substance or form at any time before the defendant pleads, without leave of court. The information may be amended at any time thereafter and on the trial as to all matters of form, at the discretion of the court, where the same can be done without prejudice to the rights of the defendant. No amendment must cause any delay of the trial unless for good cause shown by affidavit.

History: En. Sec. 1733, Pen. C. 1895; re-en. Sec. 9108, Rev. C. 1907; re-en. Sec. 11804, R. C. M. 1921.

Operation and Effect

The statute authorizes an information to be amended, as to a mere matter of form; thus, an information charging "the malicious destruction of property" may properly be amended by substituting the word "burning" for the word "destruction." *State v. Sieff*, 54 M 165, 168, 168 P 524.

Under this section, an information may be amended in matter of substance or form at any time before the defendant pleads, without leave of court, but after plea it may be amended as to form only when it can be done without prejudice to the rights of defendant, and as to substance not at all. *State v. Fisher*, 79 M 46, 49, 254 P 872.

Id. Under the above, held, that where defendant was charged by information with a misdemeanor (liquor violation) and some four months after plea of not guilty the county attorney was permitted, over objection, to amend the information by adding a charge of prior conviction thereby changing the grade of the offense from a misdemeanor to a felony—a matter of substance—the action of the court in allowing the amendment constituted error,

94-6208. (11805) **Indorsement on information.** The county attorney must indorse upon the information at the time of filing the same, the names of the witnesses for the state, if known.

History: En. Sec. 1734, Pen. C. 1895; re-en. Sec. 9109, Rev. C. 1907; re-en. Sec. 11805, R. C. M. 1921.

Duty of County Attorneys

While this section, requiring the county attorney to indorse the names of all witnesses known to him upon an information at the time of its filing, does not require the names of subsequently discovered witnesses to be so indorsed, he should do so, to avoid complaint that the accused did not have sufficient opportunity to meet the testimony of witnesses of whom he had no knowledge; concealment of names of material witnesses may, on a proper showing, constitute prejudice. *State v. Harkins*, 85 M 585, 281 P 551.

Effect of Indorsing Defendant's Wife on Information

Where the name of defendant's wife was indorsed on the information among the names of the witnesses for the state, over his objection that she was incompetent, but on the trial she was excluded from testifying, on a renewal of the objection, defendant was not prejudiced by being compelled to object to her competency before the jury. *State v. Sloan*, 22 M 293, 297, 56 P 364. See also *State v. Biggs*, 45 M 400, 403, 123 P 410.

the fact that defendant after amendment was rearraigned and pleaded over: not changing the rule.

Where Defendant Without Right to Plead Former Jeopardy

When the new trial was granted after defendant was convicted and served about a month in the state prison in a prosecution for the larceny of one of four colts, held that under the liberal rules for amending an information secs. 94-6207 and 94-6430, the information could have been amended by leave of court to charge the same offense, without violating any right of defendant and without the right of defendant to plead former jeopardy. See section 94-7602. *State v. Aus*, 105 M 82, 87, 69 P 2d 584.

References

Cited or applied as section 9108, Revised Codes, in *State v. Duncan*, 40 M 531, 533, 534, 107 P 510.

Indictment and Information § 161 (1-9).

42 C.J.S. Indictments and Informations §§ 233, 234, 237, 238, 240-242.

Operation and Effect

The act of the county attorney in indorsing, under the directions of the court, the names of other witnesses on the information is not error, as such witnesses were subject to be examined whether their names were indorsed on the information or not. *State v. Schnepel*, 23 M 523, 524, 59 P 927. See also *State v. Newman*, 34 M 434, 437, 87 P 462; *State v. Biggs*, 45 M 400, 403, 123 P 410.

Where a county attorney violated the express injunction of this section by indorsing the name of a witness as "John Doe Mitchell," whereas he knew his true name to be "James Mitchell," defendant was not entitled to a new trial in the absence of a showing that he had been prejudiced by the officer's delinquency. *State v. McDonald*, 51 M 1, 6, 149 P 279.

Purpose

The purpose of this section is to advise the defendant, so far as reasonably possible, of the witnesses known to the county attorney when the information is filed, whom the state intends to call against him, in order that he may have the opportunity to make inquiry with respect to them and prepare himself to meet their testimony. *State v. McDonald*, 51 M 1, 4, 149 P 279.

See also *State v. Gaimos*, 53 M 118, 121, 162 P 596.

This provision was intended as a safeguard to the accused against surprise and unfair advantage by the prosecuting officer, and to serve the same purpose as a like provision relating to the disclosure of the names of witnesses upon whose testimony an indictment is found and returned by a grand jury, as provided in section 94-6331. *State v. McDonald*, 51 M 1, 5, 149 P 279.

When it is Proper to Allow Indorsement After Filing

Where the name of a witness known to the county attorney at the time of filing the information was omitted, but there was no evidence of bad faith, it was proper to permit it to be indorsed thereon the day before the trial. *State v. Calder*, 23 M 504, 507, 59 P 903.

Where the name of a witness known to the county attorney at the filing of the information was omitted, but there was no evidence of bad faith, the court properly permitted it to be indorsed on the day before trial. *State v. Calder*, 23 M 504, 506, 59 P 903. See also *State v. Biggs*, 45 M 400, 403, 123 P 410.

Where a county attorney at the time of filing an information did not know that a certain person would be a witness and therefore did not indorse his name thereon, his application to permit him to make the indorsement at the beginning of the trial, held to have been properly granted. *State v. Harkins*, 85 M 585, 281 P 551; *State v. Gaffney*, 106 M 310, 313, 77 P 2d 398.

When Witnesses May be Examined Even Though They Are Not Indorsed on Information

It is error to deny the county attorney the right to examine witnesses because their names do not appear on the infor-

mation, in the absence of a showing on the part of the defendant that the county attorney did in fact know of their existence at the time the information was filed. *State v. Schnepel*, 23 M 523, 525, 59 P 927.

A witness in a criminal prosecution may not be prevented from testifying because his name was not indorsed on the information, where it does not appear from the record that the county attorney knew of the witness at the time he filed the information. *State v. Newiman*, 34 M 434, 437, 87 P 462. See also *State v. Biggs*, 45 M 400, 403, 123 P 410.

Omission by the county attorney to indorse the names of material witnesses for the state upon an information, as required by this section, either because not known to him at the inception of the prosecution, or through negligence or ignorance, is not sufficient reason to make their testimony inadmissible. *State v. McDonald*, 51 M 1, 4, 149 P 279.

Id. Even though a county attorney knew of witnesses whose names he did not indorse upon the information at the time of its filing, it was still within the discretion of the trial court to allow them to be examined.

Though this section requires the county attorney to indorse the names of the state's witnesses on an information at the time it is filed, if they are known, it does not prevent the state from using witnesses whose names are not so indorsed. Held, in the instant case, that defendant could not have been prejudiced because of previous showing, and situation was not one wherein there had been a concealment of incriminating evidence, but designed for rebuttal and corroboration. *State v. Akers*, 106 M 43, 54, 74 P 2d 1138.

Indictment and Information—53.

42 C.J.S. Indictments and Informations
§§ 85, 88, 89.

CHAPTER 63

THE GRAND JURY—ITS FORMATION—POWERS AND DUTIES—FINDING AND PRESENTING AN INDICTMENT

- Section 94-6301. When the grand jury may be drawn.
94-6302. Number of grand jury.
94-6303. Who may challenge the panel or an individual juror.
94-6304. Cause of challenge to panel.
94-6305. Cause of challenge to an individual juror.
94-6306. Manner of making and trying challenges.
94-6307. Decision upon challenges.
94-6308. Effect of allowing a challenge to a panel.
94-6309. Effect of allowing a challenge to an individual juror.
94-6310. Same.
94-6311. Appointment of a foreman.
94-6312. Oath of grand jurors.

- 94-6313. Charge of the court.
- 94-6314. Retirement of the grand jury—discharge of.
- 94-6315. Special grand jury.
- 94-6316. Powers of grand jury.
- 94-6317. Foreman may administer oaths.
- 94-6318. Evidence receivable before the grand jury.
- 94-6319. Grand jury not bound to hear evidence for the defendant.
- 94-6320. Degree of evidence to warrant indictment.
- 94-6321. Grand jurors must declare their knowledge as to commission of public offense.
- 94-6322. Must inquire into cases of persons imprisoned, etc.
- 94-6323. Entitled to access to public prison, etc.
- 94-6324. When and from whom they may ask advice, and who may be present during their sessions.
- 94-6325. Secrets of grand jury to be kept, except, etc.
- 94-6326. Grand juror not to be questioned for his conduct, except, etc.
- 94-6327. To examine books of county officers.
- 94-6328. Indictment must be found by five jurors, indorsed, etc.
- 94-6329. If not found.
- 94-6330. Effect of dismissal.
- 94-6331. Names of witnesses inserted at foot of indictment.
- 94-6332. Indictment, how presented and filed.
- 94-6333. Indictment to be signed by prosecuting attorney and foreman.
- 94-6334. Warrant to issue.
- 94-6335. Indorsement of bail.

94-6301. (11806) When the grand jury may be drawn. A grand jury must only be drawn and summoned when the district judge in his discretion considers a grand jury necessary and shall so order.

History: En. Sec. 1750, Pen. C. 1895;	Grand Jury [⊖] 9.
re-en. Sec. 9110, Rev. C. 1907; re-en. Sec.	38 C.J.S. Grand Juries § 14.
11806, R. C. M. 1921.	24 Am. Jur. 835, Grand Jury, §§ 5 et seq.

Cross-Reference

Composition and drawing of grand jury,
secs. 93-1801 to 93-1804.

94-6302. (11807) Number of grand jury. A grand jury must consist of seven persons, of whom five must concur to find an indictment.

History: Earlier acts were Sec. 53, p.	This section en. Sec. 1751, Pen. C. 1895;
227, Bannack Stat.; amd. Sec. 117, 3d Div.	re-en. Sec. 9111, Rev. C. 1907; re-en. Sec.
Rev. Stat. 1879; re-en. Sec. 117, 3d Div.	11807, R. C. M. 1921.
Comp. Stat. 1887.	

Grand Jury[⊖]3.
38 C.J.S. Grand Juries §§ 18, 24.

94-6303. (11808) Who may challenge the panel or an individual juror. The state or a person whose case will come before a grand jury, may challenge the panel of a grand jury, or an individual juror.

History: En. Sec. 118, p. 209, Cod. Stat.	Grand Jury [⊖] 17, 18.
1871; re-en. Sec. 118, 3d Div. Rev. Stat.	38 C.J.S. Grand Juries §§ 28, 29, 30.
1879; re-en. Sec. 118, 3d Div. Comp. Stat.	24 Am. Jur. 852, Grand Jury, § 28.
1887; amd. Sec. 1752, Pen. C. 1895; re-en.	
Sec. 9112, Rev. C. 1907; re-en. Sec. 11808,	
R. C. M. 1921. Cal. Pen. C. Sec. 894.	

94-6304. (11809) Cause of challenge to panel. A challenge to the panel may be interposed for the following cause: That the grand jurors were not selected, drawn, or summoned according to law.

History: En. Sec. 119, p. 209, Cod. Stat.	1887; amd. Sec. 1753, Pen. C. 1895; re-en.
1871; re-en. Sec. 119, 3d Div. Rev. Stat.	Sec. 9113, Rev. C. 1907; re-en. Sec. 11809,
1879; re-en. Sec. 119, 3d Div. Comp. Stat.	R. C. M. 1921. Cal. Pen. C. Sec. 895.

References

Cited or applied as section 119, p. 209, et seq.
 Codified Statutes 1871, in Territory v. Ingersoll, 3 M 454.

94-6305. (11810) Cause of challenge to an individual juror. A challenge to an individual grand juror may be interposed for one or more of the following causes only:

1. That he is a minor.
2. That he is an alien.
3. That he is insane.
4. That he is a prosecutor upon a charge against the defendant.
5. That he is a witness on the part of the prosecution, and has been served with process or bound by an undertaking as such.
6. That a state of mind exists on his part in reference to the case, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person is disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety, provided it satisfactorily appears to the court, upon his declaration, under oath, or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him.

History: Ap. p. Sec. 120, p. 209, Cod. Stat. 1871; re-en. Sec. 120, 3d Div. Rev. Stat. 1879; re-en. Sec. 120, 3d Div. Comp. Stat. 1887; en. Sec. 1754, Pen. C. 1895; re-en. Sec. 9114, Rev. C. 1907; re-en. Sec. 11810, R. C. M. 1921. Cal. Pen. C. Sec. 896.

References

Cited or applied as section 120, p. 209, Codified Statutes 1871, in Territory v. Ingersoll, 3 M 454.

94-6306. (11811) Manner of making and trying challenges. The challenges mentioned in the last three sections may be oral or in writing, and must be tried by the court.

History: En. Sec. 1755, Pen. C. 1895; re-en. Sec. 9115, Rev. C. 1907; re-en. Sec. 11811, R. C. M. 1921. Cal. Pen. C. Sec. 897.

94-6307. (11812) Decision upon challenges. The court must allow or disallow the challenge, and the clerk must enter its decision upon the minutes.

History: En. Sec. 1756, Pen. C. 1895; re-en. Sec. 9116, Rev. C. 1907; re-en. Sec. 11812, R. C. M. 1921. Cal. Pen. C. Sec. 898.

94-6308. (11813) Effect of allowing a challenge to a panel. If a challenge is allowed to the panel of the grand jury, the court must discharge the same, and order a new grand jury to be summoned in accordance with law.

History: En. Sec. 123, p. 210, Cod. Stat. 1871; re-en. Sec. 123, 3d Div. Rev. Stat. 1879; re-en. Sec. 123, 3d Div. Comp. Stat. 1887; re-en. Sec. 1757, Pen. C. 1895; re-en. Sec. 9117, Rev. C. 1907; re-en. Sec. 11813, R. C. M. 1921. Cal. Pen. C. Sec. 899.

94-6309. (11814) Effect of allowing a challenge to an individual juror. If the challenge is allowed to an individual juror for the first, second, or third causes, such person must be excused from the jury, and if there be not enough jurors to complete the panel left, the court must complete the same.

History: En. Sec. 124, p. 210, Cod. Stat. 1871; re-en. Sec. 124, 3d Div. Rev. Stat. 1879; re-en. Sec. 124, 3d Div. Comp. Stat. 1887; re-en. Sec. 1758, Pen. C. 1895; re-en. Sec. 9118, Rev. C. 1907; re-en. Sec. 11814, R. C. M. 1921.

94-6310. (11815) Same. When a challenge is allowed to any juror for either the fourth or fifth causes therefor, the court must charge the juror that he must not act as a grand juror in any manner in the investigation of the charge against the person challenging; and that any violation of this order will be considered a contempt of court.

History: En. Sec. 125, p. 210, Cod. Stat. 1871; re-en. Sec. 125, 3d Div. Rev. Stat. 1879; re-en. Sec. 125, 3d Div. Comp. Stat. 1887; re-en. Sec. 1759, Pen. C. 1895; re-en. Sec. 9119, Rev. C. 1907; re-en. Sec. 11815, R. C. M. 1921. Cal. Pen. C. Sec. 900.

94-6311. (11816) Appointment of a foreman. From the persons summoned to serve as grand jurors and appearing, the court must appoint a foreman. The court must also appoint a foreman when the person already appointed is excused or discharged before the grand jury is dismissed.

History: En. Sec. 53, p. 227, Bannack Stat.; amd. Sec. 117, p. 209, Cod. Stat. 1871; re-en. Sec. 117, 3d Div. Rev. Stat. 1879; re-en. Sec. 117, 3d Div. Comp. Stat. 1887; amd. Sec. 1760, Pen. C. 1895; re-en. Sec. 9120, Rev. C. 1907; re-en. Sec. 11816, R. C. M. 1921. Cal. Pen. C. Sec. 902.

Grand Jury 21.

38 C.J.S. Grand Juries § 19.

24 Am. Jur. 848, Grand Jury, § 23.

Coercion by foreman of jury. 97 ALR 1038.

Grand or petit jury as officer within constitutional or statutory provision in relation to oath or affirmation. 118 ALR 1098.

94-6312. (11817) Oath of grand jurors. When the panel of the grand jury is completed, the following oath or affirmation, in substance, must be administered to them: "You, and each of you, do solemnly swear (or affirm) that you will diligently inquire into, and true presentment make, of all public offenses against the laws of this state, committed or triable by indictment in this county, of which you have or can obtain legal evidence. You will present no one through hatred, malice, or ill-will, nor leave any unpresented through fear, favor, or affection, or for any reward, or the promise or hope thereof; but in all your presentments you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding, so help you God."

History: En. Sec. 54, p. 227, Bannack Stat.; re-en. Sec. 126, p. 210, Cod. Stat. 1871; re-en. Sec. 126, 3d Div. Rev. Stat. 1879; re-en. Sec. 126, 3d Div. Comp. Stat. 1887; re-en. Sec. 1761, Pen. C. 1895; re-en. Sec. 9121, Rev. C. 1907; re-en. Sec. 11817, R. C. M. 1921. Cal. Pen. C. Secs. 903 and 904.

Grand Jury 22.

38 C.J.S. Grand Juries § 20.

24 Am. Jur. 848, Grand Jury, § 23.

94-6313. (11818) Charge of the court. The grand jury, being impaneled and sworn, must be charged by the court. In doing so, the court must give them such information as it may deem proper, or as is required by law, as to their duties.

History: En. Sec. 127, p. 210, Cod. Stat. 1871; re-en. Sec. 127, 3d Div. Rev. Stat. 1879; re-en. Sec. 127, 3d Div. Comp. Stat. 1887; amd. Sec. 1762, Pen. C. 1895; re-en. Sec. 9122, Rev. C. 1907; re-en. Sec. 11818, R. C. M. 1921. Cal. Pen. C. Sec. 905.

Grand Jury 23.

38 C.J.S. Grand Juries § 21.

24 Am. Jur. 864, Grand Jury, § 45.

94-6314. (11819) Retirement of the grand jury—discharge of. The grand jury must then retire to a private room, and inquire into the offenses

cognizable by them. On the completion of the business before them, they must be discharged by the court; but, whether the business is completed or not, they are discharged by the final adjournment of the court, or by order of the court.

History: En. Sec. 1763, Pen. C. 1895; Grand Jury \hookrightarrow 29.
re-en. Sec. 9123, Rev. C. 1907; re-en. Sec. 38 C.J.S. Grand Juries § 32.
11819, R. C. M. 1921. Cal. Pen. C. Sec. 906.

94-6315. (11820) Special grand jury. If an offense is committed during the sitting of the court, after the discharge of a grand jury, the court may, in its discretion, require the county attorney to file an information, or may direct an order to be entered that the sheriff summon another grand jury. Such grand jury must be drawn and summoned as in other cases.

History: En. Sec. 1764, Pen. C. 1895; Grand Jury \hookrightarrow 10.
re-en. Sec. 9124, Rev. C. 1907; re-en. Sec. 38 C.J.S. Grand Juries §§ 3, 4, 36.
11820, R. C. M. 1921. Cal. Pen. C. Sec. 907.

94-6316. (11821) Powers of grand jury. The grand jury must inquire, under the direction of the court, into all public offenses committed and triable by indictment within the county, and return to the court any indictment found.

History: En. Sec. 143, p. 212, Cod. Stat. 1871; re-en. Sec. 143, 3d Div. Rev. Stat. 1879; re-en. Sec. 143, 3d Div. Comp. Stat. 1887; amd. Sec. 1780, Pen. C. 1895; re-en. Sec. 9125, Rev. C. 1907; re-en. Sec. 11821, R. C. M. 1921. Cal. Pen. C. Sec. 915.

References

Cited or applied as section 143, p. 212, Codified Statutes 1871, in *Territory v. Corbett*, 3 M 50.

Grand Jury \hookrightarrow 25.
38 C.J.S. Grand Juries §§ 33, 36.
24 Am. Jur. 856, Grand Jury, §§ 32 et seq.

94-6317. (11822) Foreman may administer oaths. The foreman may administer an oath to any witness appearing before the grand jury.

History: En. Sec. 56, p. 227, Bannack Stat.; re-en. Sec. 132, p. 211, Cod. Stat. 1871; re-en. Sec. 132, 3d Div. Rev. Stat. 1879; re-en. Sec. 132, 3d Div. Comp. Stat. 1887; amd. Sec. 1781, Pen. C. 1895; re-en. Sec. 9126, Rev. C. 1907; re-en. Sec. 11822, R. C. M. 1921. Cal. Pen. C. Sec. 918.

Grand Jury \hookrightarrow 36.
38 C.J.S. Grand Juries § 41.

94-6318. (11823) Evidence receivable before the grand jury. In the investigation of a charge for the purpose of an indictment, the grand jury must receive no other evidence than such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence. The grand jury must receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

History: En. Sec. 145, p. 213, Cod. Stat. 1871; re-en. Sec. 145, 3d Div. Rev. Stat. 1879; re-en. Sec. 145, 3d Div. Comp. Stat. 1887; amd. Sec. 1782, Pen. C. 1895; re-en. Sec. 9127, Rev. C. 1907; re-en. Sec. 11823, R. C. M. 1921. Cal. Pen. C. Sec. 919.

94-6319. (11824) Grand jury not bound to hear evidence for the defendant. The grand jury is not bound to hear evidence for the defendant, but may do so, and it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced, and for that purpose may require the county attorney to issue process for the witnesses.

History: En. Sec. 146, p. 213, Cod. Stat. 1871; re-en. Sec. 146, 3d Div. Rev. Stat. 1879; re-en. Sec. 146, 3d Div. Comp. Stat. 1887; amd. Sec. 1783, Pen. C. 1895; re-en. Sec. 9128, Rev. C. 1907; re-en. Sec. 11824, R. C. M. 1921. Cal. Pen. C. Sec. 920.

94-6320. (11825) Degree of evidence to warrant indictment. The grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury.

History: En. Sec. 147, p. 213, Cod. Stat. 1871; re-en. Sec. 147, 3d Div. Rev. Stat. 1879; re-en. Sec. 147, 3d Div. Comp. Stat. 1887; amd. Sec. 1784, Pen. C. 1895; re-en. Sec. 9129, Rev. C. 1907; re-en. Sec. 11825, R. C. M. 1921. Cal. Pen. C. Sec. 921.

Indictment and Information—10.
42 C.J.S. Indictments and Informations
§§ 24, 207.

94-6321. (11826) Grand jurors must declare their knowledge as to commission of public offense. If a member of a grand jury knows, or has reason to believe, that a public offense, triable by indictment within the county has been committed, he must declare the same to his fellow jurors, who must thereupon investigate the same.

History: En. Sec. 148, p. 213, Cod. Stat. 1871; re-en. Sec. 148, 3d Div. Rev. Stat. 1879; re-en. Sec. 148, 3d Div. Comp. Stat.

1887; amd. Sec. 1785, Pen. C. 1895; re-en. Sec. 9130, Rev. C. 1907; re-en. Sec. 11826, R. C. M. 1921. Cal. Pen. C. Sec. 922.

94-6322. (11827) Must inquire into cases of persons imprisoned, etc. The grand jury must inquire into the case of every person imprisoned in the jail of the county on a criminal charge, not indicted, or against whom an information has not been filed; into the condition and management of the public prisons in the county, and into the wilful and corrupt misconduct in office, of public officers of every description, within the county.

History: En. Sec. 149, p. 213, Cod. Stat. 1871; re-en. Sec. 149, 3d Div. Rev. Stat. 1879; re-en. Sec. 149, 3d Div. Comp. Stat.

1887; amd. Sec. 1786, Pen. C. 1895; re-en. Sec. 9131, Rev. C. 1907; re-en. Sec. 11827, R. C. M. 1921. Cal. Pen. C. Sec. 923.

94-6323. (11828) Entitled to access to public prison, etc. The grand jury is entitled to free access, at all reasonable times, to the public prisons, and to an examination, without charge, of all public records within the county.

History: En. Sec. 149, p. 213, Cod. Stat. 1871; re-en. Sec. 149, 3d Div. Rev. Stat. 1879; re-en. Sec. 149, 3d Div. Comp. Stat. 1887; en. Sec. 1787, Pen. C. 1895; re-en. Sec. 9132, Rev. C. 1907; re-en. Sec. 11828, R. C. M. 1921. Cal. Pen. C. Sec. 924.

24 Am. Jur. 856, Grand Jury, §§ 32 et seq. Matters within investigating powers of grand jury. 22 ALR 1356.

94-6324. (11829) When and from whom they may ask advice, and who may be present during their sessions. The grand jury may, at all reasonable times, ask the advice of the court, or the judge thereof, or of the county attorney; but unless such advice is asked, the judge of the court must not be present during the sessions of the grand jury. The county attorney of the county may, at all times, appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he thinks it necessary; but no other person is permitted to be present during the sessions of the grand jury except the members and witnesses actually under examination, and no person must be permitted to be present during the expression of their opinions or giving their votes upon any matter before them.

History: Ap. p. Secs. 134, 135, p. 211, Cod. Stat. 1871; re-en. Secs. 134, 135, 3d Div. Rev. Stat. 1879; re-en. Secs. 134, 135, 3d Div. Comp. Stat. 1887; en. Sec. 1788, Pen. C. 1895; re-en. Sec. 9133, Rev. C. 1907; re-en. Sec. 11829, R. C. M. 1921. Cal. Pen. C. Sec. 925.

Operation and Effect

The objects of this section are to preserve to the body alone clothed with authority of indicting for public offenses—the grand jury—a right to have witnesses

interrogated by official counsel at its sessions, and to keep the proceedings of that body as secret as possible by excluding therefrom those not vested with official authority. It does not affect the right of the attorney general to be present before the grand jury. State ex rel. Nolan v. District Court, 22 M 25, 31, 55 P 916.

Grand Jury⇒34.

38 C.J.S. Grand Juries § 40.

24 Am. Jur. 862, Grand Jury, §§ 42-44.

94-6325. (11830) Secrets of grand jury to be kept, except, etc. Every member of the grand jury must keep secret whatever he himself or any other grand juror may have said, or in what manner he or any other grand juror may have voted on a matter before them; but may, however, be required by any court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given before the court, or to disclose the testimony given before them by any person, upon a charge against such person for perjury in giving his testimony, or upon trial therefor.

History: Ap. p. Secs. 67, 68, p. 229, Bannack Stat.; re-en. Secs. 128, 129, p. 211, Cod. Stat. 1871; re-en. Secs. 128, 129, 3d Div. Comp. Stat. 1887; en. Sec. 1789, Pen. C. 1895; re-en. Sec. 9134, Rev. C. 1907; re-en. Sec. 11830, R. C. M. 1921. Cal. Pen. C. Sec. 926.

Grand Jury⇒41.

38 C.J.S. Grand Juries § 43.

24 Am. Jur. 865, Grand Jury, §§ 47 et seq.

94-6326. (11831) Grand juror not to be questioned for his conduct, except, etc. A grand juror cannot be questioned for anything he may say, or any vote he may give in the grand jury relative to a matter legally pending before the jury, except for a perjury of which he may have been guilty, in making an accusation or giving testimony to his fellow jurors.

History: En. Sec. 1790, Pen. C. 1895; re-en. Sec. 9135, Rev. C. 1907; re-en. Sec. 11831, R. C. M. 1921. Cal. Pen. C. Sec. 927.

Grand Jury⇒43.

38 C.J.S. Grand Juries § 45.

Admissibility of testimony or affidavits of grand jurors for purpose of impeaching indictment. 110 ALR 1023.

94-6327. (11832) To examine books of county officers. It is the duty of the grand jury, whenever summoned, to make a complete examination of the books, records, and accounts of all the officers of the county, and especially those pertaining to the revenue, and report thereon; and if, in their judgment, the services of an expert are necessary, the grand jury has power to employ one at an agreed compensation not to exceed five dollars per day, payable as other county charges. The judge, upon the impanelment of a grand jury, must charge them especially as to their duties under this section.

History: En. Sec. 1791, Pen. C. 1895; re-en. Sec. 9136, Rev. C. 1907; re-en. Sec. 11832, R. C. M. 1921. Cal. Pen. C. Sec. 928.

24 Am. Jur. 856, Grand Jury, §§ 32 et seq.

Matters within investigating powers of grand jury. 22 ALR 1356.

94-6328. (11833) Indictment must be found by five jurors, indorsed, etc. An indictment cannot be found without the concurrence of at least five

grand jurors. When so found, it must be indorsed, "A true bill," and the indorsement must be signed by the foreman of the grand jury.

History: En. Sec. 71, p. 229, Bannack Stat.; amd. Sec. 150, p. 213, Cod. Stat. 1871; re-en. Sec. 150, 3d Div. Rev. Stat. 1879; re-en. Sec. 150, 3d Div. Comp. Stat. 1887; amd. Sec. 1810, Pen. C. 1895; re-en. Sec. 9137, Rev. C. 1907; re-en. Sec. 11833, R. C. M. 1921. Cal. Pen. C. Sec. 940.

References

Cited or applied as section 1810, Penal Code, in *State v. Shafer*, 26 M 11, 15, 66 P 463; *State v. Johnson et al.*, 69 M 38, 43, 220 P 82.

94-6329. (11834) If not found. When there is not a concurrence of five grand jurors in finding an indictment, the foreman must certify, under his hand, that no true bill was found.

History: En. Sec. 72, p. 230, Bannack Stat.; re-en. Sec. 151, p. 213, Cod. Stat. 1871; re-en. Sec. 151, 3d Div. Rev. Stat. 1879; re-en. Sec. 151, 3d Div. Comp. Stat. 1887; amd. Sec. 1811, Pen. C. 1895; re-en.

Sec. 1938, Rev. C. 1907; re-en. Sec. 11834, R. C. M. 1921. Cal. Pen. C. Sec. 941.

Failure to indict as terminating liability of sureties on bail bond. 20 ALR 597.

94-6330. (11835) Effect of dismissal. The dismissal of the charge does not prevent its resubmission to a grand jury as often as the court may direct. But without such direction it cannot be resubmitted, nor can an information be filed.

History: En. Sec. 1812, Pen. C. 1895; re-en. Sec. 9139, Rev. C. 1907; re-en. Sec. 11835, R. C. M. 1921. Cal. Pen. C. Sec. 942.

Indictment and Information[Ⓒ]16.
42 C.J.S. Indictments and Informations
§§ 25, 26.

94-6331. (11836) Names of witnesses inserted at foot of indictment. When an indictment is found, the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court, also the name of the prosecuting witness as such; but no such indictment must be quashed for want of such indorsement if the indorsement is made before the motion to quash is disposed of.

History: Ap. p. Secs. 75, 78, p. 230, Bannack Stat.; re-en. Secs. 154, 157, p. 214, Cod. Stat. 1871; re-en. Secs. 154, 157, 3d Div. Rev. Stat. 1879; re-en. Secs. 154, 157, 3d Div. Comp. Stat. 1887; en. Sec. 1813, Pen. C. 1895; re-en. Sec. 9140, Rev. C. 1907; re-en. Sec. 11836, R. C. M. 1921. Cal. Pen. C. Sec. 943.

indictment is found are not indorsed, the indictment will be set aside upon timely motion. *State v. McDonald*, 51 M 1, 6, 149 P 279.

References

Cited or applied as section 1813, Penal Code, in *State v. Calder*, 23 M 504, 506, 59 P 903.

Operation and Effect

Witnesses whose names are not indorsed on the indictment may testify at the trial where the indictment was not found upon their testimony. But if the names of all of the witnesses upon whose testimony the

Indictment and Information[Ⓒ]34 (4).
42 C.J.S. Indictments and Informations
§ 65.
27 Am. Jur. 614, Indictments and Informations, § 43.

94-6332. (11837) Indictment, how presented and filed. An indictment, when found by the grand jury, must be presented by their foreman, in their presence, to the court, and must be filed with the clerk.

History: En. Sec. 73, p. 230, Bannack Stat.; re-en. Sec. 152, p. 213, Cod. Stat. 1871; re-en. Sec. 152, 3d Div. Rev. Stat. 1879; re-en. Sec. 152, 3d Div. Comp. Stat. 1887; amd. Sec. 1814, Pen. C. 1895; re-en. Sec. 9141, Rev. C. 1907; re-en. Sec. 11837, R. C. M. 1921. Cal. Pen. C. Sec. 944.

Indictment and Information[Ⓒ]11 (1, 2).
42 C.J.S. Indictments and Informations
§§ 28, 29, 31.
27 Am. Jur. 604, Indictments and Informations, §§ 30 et seq.

Necessity and sufficiency of jurat or certificate of officer. 116 ALR 589.

Right of accused to attack indictment or information after reversal or setting aside of conviction. 145 ALR 493. Certiorari after judgment to test sufficiency of indictment or information as regards the offense sought to be charged. 150 ALR 743.

94-6333. (11838) Indictment to be signed by prosecuting attorney and foreman. An indictment must be signed by the attorney prosecuting; and when the grand jury returns any indictment into court, the judge must examine it, and if the foreman has neglected to indorse it, "A true bill," with his name signed thereto, or if the attorney prosecuting has neglected to sign his name, the court must cause the foreman to indorse, or the attorney prosecuting to sign it, as the case may require, in the presence of the grand jury.

History: En. Sec. 77, p. 230, Bannack Stat.; re-en. Sec. 156, p. 214, Cod. Stat. 1871; re-en. Sec. 156, 3d Div. Rev. Stat. 1879; re-en. Sec. 156, 3d Div. Comp. Stat. 1887; re-en. Sec. 1815, Pen. C. 1895; re-en. Sec. 9142, Rev. C. 1907; re-en. Sec. 11838, R. C. M. 1921.

Indictment and Information 33 (1), 34 (2).
42 C.J.S. Indictments and Informations §§ 56, 58, 61.
27 Am. Jur. 604, Indictments and Informations, §§ 30 et seq.

94-6334. (11839) Warrant to issue. When an indictment is found against a defendant, a warrant must issue for his arrest, and he must be immediately brought before the court, unless the court order otherwise.

History: Ap. p. Sec. 158, p. 214, Cod. Stat. 1871; re-en. Sec. 158, 3d Div. Rev. Stat. 1879; re-en. Sec. 158, 3d Div. Comp. Stat. 1887; en. Sec. 1816, Pen. C. 1895; re-en. Sec. 9143, Rev. C. 1907; re-en. Sec. 11839, R. C. M. 1921.

References
Cited or applied as section 9143, Revised Codes, in State v. McDonald, 51 M 1, 6, 149 P 279.

Criminal Law 263.
22 C.J.S. Criminal Law § 404.

94-6335. (11840) Indorsement of bail. If the offense is bailable, the court may indorse on the back of the warrant the amount in which the defendant is to be held, or admitted to bail, pending the action; or he may order the clerk to enter the amount in which the defendant is admitted to bail, in the minutes of the court, and then the clerk must indorse the amount of the warrant.

History: En. Sec. 159, p. 214, Cod. Stat. 1871; re-en. Sec. 159, 3d Div. Rev. Stat. 1879; re-en. Sec. 159, 3d Div. Comp. Stat. 1887; en. Sec. 1817, Pen. C. 1895; re-en. Sec. 9144, Rev. C. 1907; re-en. Sec. 11840, R. C. M. 1921.

CHAPTER 64

RULES OF PLEADING AND FORM OF INFORMATION AND INDICTMENT

- Section 94-6401. Forms and rules of pleading.
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94-6401. (11841) Forms and rules of pleading. All the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this code.

History: En. Sec. 80, p. 231, Bannack Stat.; re-en. Sec. 162, p. 216, Cod. Stat. 1871; re-en. Sec. 162, 3d Div. Rev. Stat. 1879; re-en. Sec. 162, 3d Div. Comp. Stat. 1887; amd. Sec. 1830, Pen. C. 1895; re-en. Sec. 9145, Rev. C. 1907; re-en. Sec. 11841, R. C. M. 1921. Cal. Pen. C. Sec. 948.

Operation and Effect

Under this section, an information is sufficient where it conforms substantially to the form laid down in section 94-6404, and to the rules prescribed in section 94-6412, and there is no imperfection in matter or form thereof tending to the prejudice of a substantial right of the de-

fendant on its merits, as provided in section 94-6413. *State v. Stickney*, 29 M 523, 528, 75 P 201.

References

Cited or applied as section 9145, Revised Codes, in *State v. Brown*, 38 M 309, 312, 99 P 954; *State v. Polich*, 70 M 523, 526, 226 P 519; *State v. Fisher*, 79 M 46, 48, 254 P 872; *State v. Gondeiro*, 82 M 530, 536, 268 P 507.

Indictment and Information—55.

42 C.J.S. Indictments and Informations § 98.

94-6402. (11842) First pleading by the state is indictment or information. The first pleading on the part of the state is either an indictment or an information.

History: Ap. p. Sec. 81, p. 231, Bannack Stat.; re-en. Sec. 163, p. 216, Cod. Stat. 1871; re-en. Sec. 163, 3d Div. Rev. Stat. 1879; re-en. Sec. 163, 3d Div. Comp. Stat. 1887; amd. Sec. 1831, Pen. C. 1895;

re-en. Sec. 9146, Rev. C. 1907; re-en. Sec. 11842, R. C. M. 1921. Cal. Pen. C. Sec. 949.

Indictment and Information—4.

42 C.J.S. Indictments and Informations §§ 5, 7, 8, 12-14, 16.

94-6403. (11843) Indictment or information, what to contain. The indictment or information must contain:

1. The title of the action, specifying the name of the court in which the same is filed, and the names of the parties;
2. A statement of the facts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended.

History: En. Sec. 82, p. 231, Bannack Stat.; amd. Sec. 164, p. 216, Cod. Stat. 1871; re-en. Sec. 164, 3d Div. Rev. Stat. 1879; re-en. Sec. 164, 3d Div. Comp. Stat. 1887; amd. Sec. 1832, Pen. C. 1895; re-en. Sec. 9147, Rev. C. 1907; re-en. Sec. 11843, R. C. M. 1921. Cal. Pen. C. Sec. 950.

Bill of Particulars

Where one charged with crime deems the information too indefinite or uncertain he has the privilege of demanding a bill of particulars to supply the deficiency. Modern tendency of criminal procedure has been toward simplification. *State v. Summers*, 107 M 34, 35, 79 P 2d 560.

Where an inquest had been held a year prior to trial in a prosecution for manslaughter for the killing of a pedestrian by reckless driving, the court could presume that the coroner had complied with the law (sec. 94-201-6) as to the transcript of the testimony, which was available for defendant's inspection for the desired information, held, denial of defendant's motion for a bill of particulars not an abuse of the court's discretion. *State v. Robinson*, 109 M 322, 327, 96 P 2d 265.

As against the contention that a bill of particulars may not be resorted to for the purpose of perfecting a defective information, held, that such is the rule, but the bill may be resorted to for the purpose of clarifying the general terms of the information. A bill of particulars performs a function for the information similar to that of a definition for a word; it is designed for use where the information is sufficient, on demurrer, and, in the sound discretion of the court and in furtherance of justice, to give accused fair notice of what he is called on to defend, a bill of particulars may, on motion of accused, be required. *State v. Wong Sun*, 114 M 185, 192, 133 P 2d 761.

Clerical Mistake Not Vital

Information inadvertently charging that defendant on a certain day in the year "19122" sold intoxicating liquor held not to have prejudiced him in any substantial right, where evidence of a sale made on that day in the year 1922 was admitted without objection by defendant and he was prepared to meet the charge on the assumption that that was the correct date, introduced evidence tending to establish an alibi and offered no objection to an instruction advising the jury that if they found that the sale was made on that day they must find him guilty. *State v. Polich*, 70 M 523, 526, 226 P 519.

Declaratory of the Common Law

This section is but a paraphrase of the common law rules covering the requisites

of criminal pleading. *State v. Wolf*, 56 M 493, 496, 185 P 556.

Essentials in General

An information stating the proper title of court and cause and containing a statement of the facts constituting the offense, charged in ordinary and concise language so as to enable a person of common understanding to know what was intended, is sufficient. *State v. Paine*, 61 M 270, 273, 202 P 203.

If an information for perjury sets forth the substance of the matter in respect to which the offense was committed, in what court and before whom the oath alleged to have been false was taken, and that the court or the person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which perjury is assigned, it is sufficient. *State v. Jackson*, 88 M 420, 428, 293 P 309.

Language of Statute—Bill of Particulars

Ordinarily, an information charging a public offense in the language of the statute is sufficient; if deemed insufficient as to details and facts, the remedy of defendant is by way of a request for a bill of particulars. *State v. Hahn*, 105 M 270, 273, 72 P 2d 459.

Name of County Material

Where, in an information for murder, the only mention of the county in which the crime was committed appeared in the caption describing the court in which, and the officer by whom, the charge was preferred, while in the charging part of the document the word "county" was not used at all, and the only reference words found there were in the expression "then and there," the first of which referred to a preceding date alleged as the date of the crime, while the latter indicated some place, not described, where the defendant then was, it was held that, in the absence of an expression such as "in the county aforesaid" or "said county," thus referring to the caption, the information did not allege the county in which the offense had been committed, and was fatally defective. *State v. Beesskov*, 34 M 41, 50, 85 P 376.

The charge in the information that the seditious language alleged to have been used by defendant was uttered in M. county was a sufficient allegation of the place. *State v. Fowler*, 59 M 346, 352, 196 P 992.

An information which charged that defendant at the county of M., state of Montana, "then and there being, then and there did willfully, etc., possess" certain liquor, etc., was not open to the objection that it failed to allege that the act was committed in M. county, "then" re-

ferring to the time and "there" to that county. *State v. Polich*, 70 M 523, 526, 226 P 519.

Name of Parties

Where an information was against one as George Howard, alias James Howard, alias Joe Kirby, the same was in compliance with the requirements of this section and section 94-6405, the information having charged his prior conviction, and the different names being for the purpose of identifying him as the person previously convicted. *State v. Howard*, 30 M 518, 520, 77 P 50.

Statement of Facts Constituting the Offense

If a person of common understanding would, from the reading of an information, know that the defendant in a given case was charged with murder in the first degree, the defendant will be presumed to have had a like knowledge, and be held not to have been prejudiced by the use of peculiar phraseology in it. *State v. McGowan*, 36 M 422, 425, 93 P 552.

Allegations sufficient for a common-law indictment for murder are sufficient for an information under the code. *State v. Hayes*, 38 M 219, 221, 99 P 434.

An information alleging that at a specified time and place defendant did "wilfully, unlawfully, feloniously, premeditatedly, and of his malice aforethought kill and murder" a designated person, is sufficient to charge murder, though it does not set forth facts showing how and by what means the actual killing was accomplished. *State v. Hayes*, 38 M 219, 221, 99 P 434. See also *State v. Nielson*, 38 M 451, 454, 455, 100 P 229; *State v. Guerin*, 51 M 250, 257, 152 P 747.

An information alleging that accused assaulted deceased, violently threw her to the ground, and otherwise assaulted her until she became unconscious, and then permitted her to lie exposed to inclement weather, and neglected to provide her with necessary clothing and protection, by reason of which assault and exposure she died, charged murder, and the state was not bound to elect whether it would proceed on the theory of assault, or exposure, or both. *State v. Rees*, 40 M 571, 575, 107 P 893.

An information charging a violation of the sedition act is sufficient under this section and the two following sections, in stating that the defendant had said that the American soldiers "would act in the same way and commit the same atrocities as have been reported of the German soldiers," without setting out the atrocities reported to have been committed by the German soldiers. *State v. Wyman*, 56 M 600, 607, 186 P 1.

Where two defendants, tried separately, had entered into a conspiracy to commit robbery by taking incriminating evidence from the possession of an officer in the perpetration of which the latter was killed by one of them, the information against the other charging a premeditated killing need not set forth the facts constituting the crime of robbery or allege that in the attempt to commit the latter crime the homicide was committed. *State v. Bolton*, 65 M 74, 80, 212 P 504.

An information must charge the crime alleged to have been committed, with certainty and precision, setting forth all the affirmative facts which constitute a prima facie case under the statute charged to have been violated. *State v. Hem*, 69 M 57, 62, 63, 220 P 80.

Neither the time of day, the means of conveyance, the particular brand of liquor transported nor the termini of the route over which it is carried are made constituent elements of the completed offense of illegal transportation, and therefore an information charging that crime is sufficient without allegations to that effect. *State v. Dow*, 71 M 291, 298, 229 P 402.

Under subdivision 2 of this section, providing that an information charging a criminal offense must contain a statement of the facts constituting the crime in ordinary and concise language so as to enable a person of common understanding to know what is intended, held, that an information charging defendant with stealing "five Ford wire wheels and tires" was sufficient to advise him that five wire wheels and tires for a Ford automobile were the articles charged to have been stolen, and therefore sufficient to enable him to prepare for his defense. *State v. Dimond*, 82 M 110, 112, 265 P 5.

The information in a prosecution charging sale of intoxicating liquor to a minor, under Chapter 122, Laws of 1927 (94-35-106 et seq.), need not specify the particular kind of liquor, the allegation that defendant sold "certain intoxicating liquor," etc., being sufficient to advise defendant of the charge against him within the meaning of this section, declaring that the information must contain a statement of facts constituting the offense, in ordinary and concise language so as to enable a person of common understanding to know what is intended. *State v. Baker*, 87 M 295, 298, 286 P 1113.

Information charging unlawful sale of morphine hydrochloride held sufficient to meet the requirements of this section, sections 94-6405 and 94-6412, relative to the statement of facts constituting the offense and the degree of certainty which will enable the court to pronounce judgment upon a conviction. *State v. Brennan*, 89 M 479, 487, 300 P 273.

Information charging defendant, president of a brokerage firm, with larceny as bailee of a sum of money, couched substantially in the language of subdivision 2 of section 94-2701, was sufficient and not vulnerable to a general demurrer. *State v. Lake*, 99 M 128, 136, 43 P 2d 627.

Information charging defendant willfully, unlawfully and feloniously attempted to have sexual intercourse with prosecutrix, and forcibly and violently, without her consent and contrary to her wishes and expressed protest, demanded that she submit to sexual intercourse and by force attempted to overcome her and accomplish the act of intercourse, held sufficient under sections 94-6403, subd. 2 and 94-6405, against objections that no overt act was charged and intent insufficiently alleged. *State v. Stevens*, 104 M 189, 195, 65 P 2d 612.

94-6404. (11844) **Form of.** It may be substantially in the following form: The State of Montana against A B. In the district court of the district in and for the county of, the day of, A. D. nineteen A B is accused by the grand jury of the county of, by this indictment (or by the county attorney by this information), of the crime of (giving its legal appellation, such as murder, arson, or the like, or designating it as felony or misdemeanor), committed as follows: The said A B on the day of, A. D. nineteen, at the county of (here set forth the act or omission charged as an offense), contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the State of Montana.

History: En. Sec. 1833, Pen. C. 1895; re-en. Sec. 9148, Rev. C. 1907; re-en. Sec. 11844, R. C. M. 1921. Cal. Pen. C. Sec. 951.

Operation and Effect

An information need not necessarily contain a specific allegation that the prosecution is conducted in the name and by authority of the state, as required by the constitution, where it appears from the record that it is so conducted, is in the form prescribed by this section, and meets the requirements of section 94-6412. *State v. Barry*, 45 M 582, 585, 124 P 774.

An information charging illegal transportation of intoxicating liquor in the language of this section, that defendant "at the county of M. did willfully, wrongfully and unlawfully transport certain intoxicating liquors," etc., was sufficient as against the contention that it was fatally defective for failure to charge that the offense was committed within the jurisdiction of the court; if deemed insufficient it was the duty of defendant to apply for

References

Cited or applied as section 1832, Penal Code, in *State v. Dickinson*, 21 M 595, 55 P 539; *State v. Hliboka*, 31 M 455, 461, 78 P 965; *State v. Phillips*, 36 M 112, 118, 92 P 299; as section 9147, Revised Codes, in *State v. Pemberton*, 39 M 530, 532, 104 P 556; *State v. Harris*, 51 M 496, 154 P 198; *State v. Griebel*, 65 M 390, 395, 211 P 321; *State v. Redmond*, 73 M 376, 378, 237 P 486; *State v. Hanks*, 116 M 399, 406, 153 P 2d 220.

Indictment and Information—17 et seq., 35 et seq.

42 C.J.S. Indictments and Informations §§ 7, 11 et seq., 35, 110 et seq.

27 Am. Jur. 608, Indictments and Informations, §§ 35 et seq.

Statutes regarding form of indictment as violation of constitutional requirement of "indictment." 69 ALR 1392.

a bill of particulars in advance of the trial. *State v. Redmond*, 73 M 376, 378, 237 P 486.

References

Cited or applied as section 1833, Penal Code, in *State v. Stickney*, 29 M 523, 528, 75 P 201; *State v. Howard*, 30 M 518, 520, 77 P 50; *State v. Tully*, 31 M 365, 369, 78 P 760; as section 9148, Revised Codes, in *State v. Brown*, 38 M 309, 312, 99 P 954; *State v. Sieff*, 54 M 165, 168, 168 P 524; *State v. Wyman*, 56 M 600, 607, 186 P 1; *State v. Fowler*, 59 M 346, 352, 196 P 992; *State v. Polich*, 70 M 523, 226 P 519; *State v. Grasswick*, 77 M 326, 329, 250 P 613; *State v. Thierfelder*, 114 M 104, 110, 132 P 2d 1035; *State v. Hanks*, 116 M 399, 406, 153 P 2d 220.

Indictment and Information—19, 37.

42 C.J.S. Indictments and Informations §§ 35, 79.

27 Am. Jur. 608, Indictments and Informations, §§ 35 et seq.

94-6405. (11845) **It must be direct and certain.** The indictment or information must be direct and certain, as it regards—

1. The party charged;
2. The offense charged;
3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense.

History: Ap. p. Sec. 83, p. 231, *Bannack Stat.*; re-en. Sec. 165, p. 216, *Cod. Stat.* 1871; re-en. Sec. 165, 3d Div. *Rev. Stat.* 1879; re-en. Sec. 165, 3d Div. *Comp. Stat.* 1887; en. Sec. 1834, *Pen. C.* 1895; re-en. Sec. 9149, *Rev. C.* 1907; re-en. Sec. 11845, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 952.

Declaratory of Common Law

This section is but a paraphrase of the common law rules covering the requisites of criminal pleading. *State v. Wolf*, 56 M 493, 496, 185 P 556.

Direct and Certain

An information not objectionable on the ground that it did not contain a statement of facts constituting the offense in ordinary and concise language, or that it was not direct and certain in its statements. *State v. Phillips*, 36 M 112, 118, 92 P 299.

Language of Statute—Bill of Particulars

Ordinarily, an information charging a public offense in the language of the statute is sufficient; if deemed insufficient as to details and facts, the remedy of defendant is by way of a request for a bill of particulars. *State v. Hahn*, 105 M 270, 273, 72 P 2d 459.

Particular Circumstances of the Offense

An information charging sedition, in that defendant knowingly, unlawfully, etc., uttered and published disloyal, profane, violent, scurrilous, contemptuous, and abusive language concerning the soldiers and the uniform of the United States army, was defective, under this section, for failure to set out the specific words characterizing his remarks as disloyal, contemptuous, etc. *State v. Wolf*, 56 M 493, 499, 185 P 556.

In view of the provision of this section, requiring that the information must be direct and certain, *inter alia*, as to the particular circumstances of the offense charged when they are necessary to constitute a complete offense, an information charging one with seditious utterances should set forth the fact whether the words were uttered in private conversation with a single person or from a public platform, or were disseminated through the medium of printed articles. *State v. McGlynn*, 60 M 416, 420, 199 P 708.

Sufficiency of Information

An information for murder should di-

rectly allege that death resulted from the mortal wounds inflicted by defendant. *State v. Keerl*, 29 M 508, 511, 75 P 362.

An information which, after charging forgery of a promissory note, added that defendant, knowing that the instrument was false, uttered, passed, and published the same as true and genuine, with intent to defraud, etc., while dangerously near invading the provisions of this section, is not fatally defective. *State v. Mitten*, 36 M 376, 381, 92 P 969.

When Bill of Particulars Available

Where defendant charged with crime deems the information too indefinite and uncertain he has the privilege of applying for a bill of particulars, and where it is apparent that by reason of the too general character of the charge defendant may have difficulty in preparing his defense, the trial court should incline toward granting the motion for such a bill. *State v. Stevens*, 104 M 189, 198, 65 P 2d 612.

References

Cited or applied as section 165, Third Division Revised Statutes 1879, in *Territory v. Layne*, 7 M 225, 14 P 705; as section 1834, Penal Code, in *State v. Bloor*, 20 M 574, 582, 52 P 611; *State v. Howard*, 30 M 518, 520, 77 P 50; *State v. Hliboka*, 31 M 455, 461, 78 P 965; as section 9149, Revised Codes, in *State v. Hayes*, 38 M 219, 221, 99 P 434; *State v. Pemberton*, 39 M 530, 533, 104 P 556; *State v. Wyman*, 56 M 600, 610, 186 P 1; *State v. Fowler*, 59 M 346, 352, 196 P 992; *State v. Bolton*, 65 M 74, 80, 212 P 504; *State v. Hem*, 69 M 57, 80, 220 P 80; *State v. Dow*, 71 M 291, 299, 229 P 402; *State v. Brennan*, 89 M 479, 487, 300 P 273; *State v. Wong Sun*, 114 M 185, 190, 133 P 2d 761; *State v. Hanks*, 116 M 399, 406, 153 P 2d 220.

Indictment and Information—70, 71. 42 C.J.S. Indictments and Informations §§ 99, 100.

Court's power to amend indictment in matters of form. 7 ALR 1517.

Substitution by mistake of name of person other than defendant for defendant's name. 79 ALR 219.

Error in naming offense covered by allegations of specific facts. 121 ALR 1088.

Time and manner of raising objections of misnomer of defendant in indictment or information. 132 ALR 410.

94-6406. (11846) When defendant is indicted by fictitious name, etc. When a defendant is charged by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, referring to the fact of his being charged by the name mentioned in the indictment or information.

History: En. Sec. 187, p. 218, Cod. Stat. 1871; re-en. Sec. 187, 3d Div. Rev. Stat. 1879; re-en. Sec. 187, 3d Div. Comp. Stat. 1887; amd. Sec. 1835, Pen. C. 1895; re-en. Sec. 9150, Rev. C. 1907; re-en. Sec. 11846, R. C. M. 1921. Cal. Pen. C. Sec. 953.

Indictment and Information—159 (4).
42 C.J.S. Indictments and Informations
§ 241.

94-6407. (11847) Must charge but one offense and in one form, except where it may be committed by different means. The indictment or information must charge but one offense, but the same offense may be set forth in different forms under different counts, and when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same counts.

History: En. Sec. 188, p. 218, Cod. Stat. 1871; re-en. Sec. 188, 3d Div. Rev. Stat. 1879; re-en. Sec. 188, 3d Div. Comp. Stat. 1887; amd. Sec. 1836, Pen. C. 1895; re-en. Sec. 9151, Rev. C. 1907; re-en. Sec. 11847, R. C. M. 1921. Cal. Pen. C. Sec. 954.

Operation and Effect

Under this section, the information can charge but one offense, and it is only for that offense that a conviction can be had. *State v. Gaimos*, 53 M 118, 124, 162 P 596.

While under this section, an information must charge but one offense, under section 94-6802, any number of offenses against the Prohibition Act may be charged in separate counts in one information and where defendant pleaded to the information in a liquor prosecution containing a number of counts, any informality in that respect did not tend to his prejudice and must, therefore, under section 94-6434, be disregarded on appeal. *State v. Grasswick*, 77 M 326, 329, 250 P 613.

Waived by Failure to Demur

Any objection to the inclusion in one count of the statement of different forms of the same offense must be made in the district court, and before plea. The objection that the information charges two offenses is waived by a failure to demur. *State v. Mahoney*, 24 M 281, 285, 61 P 647.

What Constitutes Two Offenses

An information charging forgery in two counts, the first by the false making of

the instrument, and the second by uttering it, is not vulnerable to attack by demurrer for charging two offenses, the inhibition of this section, that the indictment or information must charge but one offense, being directed to pleadings which charge more than one distinct offense and not to one which in each of two counts charges the same offense. *State v. Mitton*, 37 M 366, 370, 96 P 926. See *First National Bank v. Barrett*, 52 M 359, 365, 157 P 951.

In a criminal prosecution, different acts of the same sort may be proved for the purpose of corroboration. *State v. Gaimos*, 53 M 118, 124, 162 P 596.

An information against a defendant for knowingly and without consideration taking or receiving from a prostitute any of her earnings, and also with living upon the earnings of a prostitute, charges two distinct offenses in violation of this section. *State v. Kanakaris*, 54 M 180, 182, 169 P 42.

References

Cited or applied as section 188, p. 218, Codified Statutes 1871, in *Territory v. Fox*, 3 M 440; as section 1836, Penal Code, in *State v. Gordon*, 35 M 458, 464, 90 P 173; *State v. Marchindo*, 65 M 431, 440 et seq., 211 P 1093.

Indictment and Information—125 (1, 19).

42 C.J.S. Indictments and Informations
§§ 161, 163, 165-167, 177.

94-6408. (11848) Statement as to time when offense was committed. The precise time at which the offense was committed need not be stated in the indictment or information, but it may be alleged to have been committed at any time before finding or filing thereof, except where the time is a material ingredient in the offense.

History: En. Sec. 84, p. 231, Bannack Stat.; re-en. Sec. 166, p. 216, Cod. Stat. 1871; re-en. Sec. 166, 3d Div. Rev. Stat. 1879; re-en. Sec. 166, 3d Div. Comp. Stat. 1887; amd. Sec. 1837, Pen. C. 1895; re-en. Sec. 9152, Rev. C. 1907; re-en. Sec. 11848, R. C. M. 1921. Cal. Pen. C. Sec. 955.

Operation and Effect

An indictment for rape, which charges the commission of the offense "on or about" a certain day, sufficiently states the time. *State v. Thompson*, 10 M 549, 557, 27 P 349.

Unless time is a material ingredient in the offense or in charging the same, it is only necessary to prove that it was committed prior to the finding or filing of the information or indictment. *State v. Rogers*, 31 M 1, 4, 77 P 293.

Id. A conviction for burglary will not be disturbed because it appears it was committed on a day prior to that alleged in the information, where defendant was not prejudiced.

In a prosecution for homicide, where all the evidence showed that, if committed at all, the offense was committed on the day alleged in the information, the court was warranted in charging the jury that it was not necessary that the homicide should have been committed on the precise date laid in the pleading, but it was sufficient if it appeared that it had been committed prior to the filing of the information. *State v. Vanella*, 40 M 326, 342, 106 P 364.

If the information charging rape fixes a definite date, and the evidence discloses that a mistake occurred in the pleading, and that the identical crime charged was committed upon another date, but before the information was filed, the prosecution will not necessarily fail, though defendant may be entitled to a continuance because of the variance. *State v. Gaimos*, 53 M 118, 123, 162 P 596.

Id. The statute does not require the prosecution, in a trial for rape, to prove the crime to have been committed on the very day named in the indictment or information as that of its commission.

Held, that defendant, convicted of unlawful possession of intoxicating liquor,

was not prejudiced by the variance between the allegation in the information that the offense was committed on the 10th of December and the state's proof of its commission on the 12th of the same month. *State v. Sorenson*, 65 M 65, 210 P 752.

Under the Prohibition Act it is a public offense to possess liquor unlawfully at any time, hence time is not an ingredient of the offense within the meaning of this section, providing that the precise time at which it was committed need not be stated in the information, it being sufficient if it is alleged that its commission occurred at any time before filing thereof, except where the time is a material ingredient in the offense. *State v. Terry*, 77 M 297, 299, 250 P 612.

An allegation in an information charging murder that the offense was committed "on or about" a certain date of a given year, held sufficient, such date being prior to the date of filing, and since time was not an essential ingredient of the offense, and the exact time is not claimed to have been a material ingredient. *State v. Heaston*, 109 M 303, 307, 97 P 2d 330.

When Refusal of Continuance not Prejudicial

Where defendant, charged with committing lewd and lascivious acts upon a female child of the age of nine years, had been notified by the county attorney after plea and the day before the trial that he intended to prove that the offense was committed about a week later than charged in the information and the court denied his motion for continuance, such refusal was not prejudicial error since time is not a material ingredient of the offense. *State v. Kocher*, 112 M 511, 518, 119 P 2d 35.

References

Cited or applied as section 9152, Revised Codes, in *State v. Harris*, 51 M 496, 502, 154 P 198; *State v. Polich*, 70 M 523, 525, 226 P 519.

Indictment and Information \S 87 (1, 3).

42 C.J.S. Indictments and Informations $\S\S$ 124, 125.

94-6409. (11849) Statement as to person injured or intended to be. When an offense involves the commission of, or attempts to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material.

History: En. Sec. 189, p. 218, Cod. Stat. 1871; re-en. Sec. 189, 3d Div. Rev. Stat. 1879; re-en. Sec. 189, 3d Div. Comp. Stat. 1887; re-en. Sec. 1838, Pen. C. 1895; re-en. Sec. 9153, Rev. C. 1907; re-en. Sec. 11849, R. C. M. 1921. Cal. Pen. C. Sec. 956.

Operation and Effect

Where a defendant was convicted of crime upon an information stating the name of the injured person as "Frank Rex," whereas his own testimony showed that it was "Frank Röck," and there was

not any showing that he was named or had been known as Frank Rex, it was held that, the names being unlike in sound or spelling, and the information having failed to disclose any description which made it at all certain that "Frank Rex" and "Frank Röck" were one and the same person, the variance was fatal to conviction. *State v. Lee*, 33 M 203, 205, 83 P 223.

While a mistake in the name of the person injured is not to be deemed material, if the injury is so described in other respects as to identify it, yet if it is not so

identified by the evidence as that it can be said to be the same, there is such a variance as amounts to a failure of proof, and the conviction cannot be sustained. *State v. Moxley*, 41 M 402, 409, 110 P 83.

References

State v. Huffman, 89 M 194, 202, 296 P 789.

Indictment and Information—101.

42 C.J.S. Indictments and Informations § 142.

94-6410. (11850) Construction of words used. The words used in an indictment or information are construed in their usual acceptance in common language, except such words and phrases as are defined by law, which are construed according to their legal meaning.

History: En. Sec. 86, p. 231, Bannack Stat.; re-en. Sec. 168, p. 216, Cod. Stat. 1871; re-en. Sec. 168, 3d Div. Rev. Stat. 1879; re-en. Sec. 168, 3d Div. Comp. Stat. 1887; re-en. Sec. 1839, Pen. C. 1895; re-en. Sec. 9154, Rev. C. 1907; re-en. Sec. 11850, R. C. M. 1921. Cal. Pen. C. Sec. 957.

References

State v. Hem, 69 M 57, 62, 220 P 80.

Indictment and Information—117.

42 C.J.S. Indictments and Informations § 107.

94-6411. (11851) Words used in a statute need not be strictly followed. Words used in a statute to define a public offense need not be strictly pursued in the indictment or information, but other words conveying the same meaning may be used.

History: En. Sec. 87, p. 231, Bannack Stat.; re-en. Sec. 169, p. 216, Cod. Stat. 1871; re-en. Sec. 169, 3d Div. Rev. Stat. 1879; re-en. Sec. 169, 3d Div. Comp. Stat. 1887; amd. Sec. 1840, Pen. C. 1895; re-en. Sec. 9155, Rev. C. 1907; re-en. Sec. 11851, R. C. M. 1921. Cal. Pen. C. Sec. 958.

Operation and Effect

An information charging defendant with having permitted a female to be or remain in his saloon for the purpose of being there supplied with liquor, which alleged that defendant was "then and there" the owner and manager having charge and control, was sufficient to apprise him that he was accused of being in control "for the

time being," the words used in the statute under which the prosecution was brought, and was therefore sufficient under this section. *State v. Conway*, 38 M 42, 43, 98 P 654.

References

Cited or applied as section 169, p. 216, Codified Statutes 1871, in *Territory v. Corbett*, 3 M 50; as section 169, Third Division Compiled Statutes 1887, in *State v. Fournier*, 12 M 235, 29 P 824; *State v. Hem*, 69 M 57, 220 P 80.

Indictment and Information—110 (1).

6 C.J.S. Assault and Battery § 105; 42 C.J.S. Indictments and Informations § 139.

94-6412. (11852) Indictment or information, when sufficient. The indictment or information is sufficient, if it can be understood therefrom—

1. That it is entitled in a court having authority to receive it, though the name of the court be not stated;

2. If an indictment, that it was found by a grand jury of the county in which the court was held; or if an information, that it was subscribed and presented to the court by the county attorney of the county in which the court was held;

3. That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury or county attorney, as the case may be, unknown;

4. That the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein;

5. That the offense was committed at some time prior to the time of finding the indictment or filing of the information;

6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended;

7. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case.

History: Ap. p. Sec. 88, p. 231, Bannack Stat.; re-en. Sec. 170, p. 216, Cod. Stat. 1871; re-en. Sec. 170, 3d Div. Rev. Stat. 1879; re-en. Sec. 170, 3d Div. Comp. Stat. 1887; re-en. Sec. 1841, Pen. C. 1895; re-en. Sec. 9156, Rev. C. 1907; re-en. Sec. 11852, R. C. M. 1921. Cal. Pen. C. Sec. 959.

Subd. 4

Operation and Effect

Subdivision 4 of this section has no application to an information charging larceny. *State v. De Wolfe*, 29 M 415, 422, 74 P 1084.

The exception named in subdivision 4 of this section refers to offenses committed in the manner named in sections 94-5605 and 94-5606. *State v. Tully*, 31 M 365, 369, 78 P 760.

An information charging illegal transportation of intoxicating liquor in the language of section 94-6404, that defendant "at the county of M. did willfully, wrongfully and unlawfully transport certain intoxicating liquors," etc., was sufficient as against the contention that it was fatally defective for failure to charge that the offense was committed within the jurisdiction of the court; if deemed insufficient it was the duty of defendant to apply for a bill of particulars in advance of the trial. *State v. Redmond*, 73 M 376, 378, 237 P 486.

Subd. 6

Operation and Effect

Stating facts, charging a crime, in the form of participial clauses, though that is a method of pleading not to be commended, does not render an information abortive. The proper way, however, to make the charge is by direct allegation. *State v. Pemberton*, 39 M 530, 532, 104 P 556.

Id. An information for robbery is sufficient, with respect to the crime, if it enables a person of ordinary understanding to know what is intended to be charged.

Id. It is sufficient, in an information for robbery, to charge that the taking was accomplished "with" force and fear, instead of "by means of force and fear." The word "with," in this connection, is equivalent to the expression "by means of."

An information must charge the crime alleged to have been committed, with certainty and precision, setting forth all the affirmative facts which constitute a prima facie case under the statute charged to have been violated. *State v. Hem*, 69 M 57, 62, 63, 220 P 80.

Subd. 7

Operation and Effect

Where an indictment for secreting a public record alleged that defendant, being an officer and having in his custody a certain public record, and which said record came into and was in his hands, and was by him feloniously secreted, and defendant contended that the charging part was an unfinished sentence, and that the allegation respecting secretion was merely descriptive of the record, the offense was charged with "such a degree of certainty" that judgment might be pronounced according to the right of the case, as required by this section. *State v. Bloor*, 20 M 574, 582, 52 P 611.

An information in charging the crime of sedition is fatally defective on the ground of uncertainty where it is alleged that the offense consists of the statement that "she wished the people would revolt and that she would shoulder a gun and get the president the first one," for the reason that a presumption must be indulged in to determine whether the defendant meant the people or the president of the United States or the people or president of some other country. *State v. Smith*, 58 M 567, 572, 194 P 131.

Information charging unlawful sale of morphine hydrochloride held sufficient to meet the requirements of sections 94-6403 and 94-6405, and this section, relative to

the statement of facts constituting the offense and the degree of certainty which will enable the court to pronounce judgment upon a conviction. *State v. Brennan*, 89 M 479, 487, 300 P 273.

Operation in General

An information need not necessarily contain a specific allegation that the prosecution is conducted in the name and by authority of the state, as required by the constitution, where it appears from the record that it is so conducted, is in the form prescribed by section 94-6404, and meets the requirements of this section. *State v. Barry*, 45 M 582, 584, 124 P 774.

Purpose

This section, and sections 94-6401 and 94-6404 were intended to relax the technical rules which prevailed at the common law, and to simplify the procedure to the end that regard to substance rather than form should be the rule of interpretation. *State v. Brown*, 38 M 309, 312, 99 P 954.

94-6413. (11853) Not insufficient for defect of form not tending to prejudice defendant. No indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits.

History: En. Sec. 1842, Pen. C. 1895; re-en. Sec. 9157, Rev. C. 1907; re-en. Sec. 11853, R. C. M. 1921. Cal. Pen. C. Sec. 960.

Clerical Mistake Immaterial

Information inadvertently charging that defendant on a certain day in the year "19122" sold intoxicating liquor held not to have prejudiced him in any substantial right, where evidence of a sale made on that day in the year 1922 was admitted without objection by defendant and he was prepared to meet the charge on the assumption that that was the correct date, introduced evidence tending to establish an alibi and offered no objection to an instruction advising the jury that if they found that the sale was made on that day they must find him guilty. *State v. Polich*, 70 M 523, 526, 226 P 519.

Date of Offense Held Immaterial

A conviction for burglary will not be disturbed because it appears it was committed on a day prior to that alleged in the information, where defendant was not prejudiced. *State v. Rogers*, 31 M 1, 5, 77 P 293.

Information Signed by Deputy County Attorney Held Immaterial

A deputy county attorney may present an information in his own name; hence the fact that an information was signed by

References

Cited or applied as section 170, Third Division Revised Statutes, 1879, in *Territory v. Harding*, 6 M 323, 12 P 750; *Territory v. Layne*, 7 M 225, 14 P 705; as section 1841, Penal Code, in *State v. Bloor*, 20 M 574, 582, 52 P 611; *State v. Gill*, 21 M 151, 153, 53 P 184; *State v. De Wolfe*, 29 M 415, 421, 74 P 1084; *State v. Stickney*, 29 M 523, 529, 75 P 201; *State v. Howard*, 30 M 518, 521, 77 P 50; *State v. Rogers*, 31 M 1, 4, 77 P 293; *State v. Beesskove*, 34 M 41, 50, 85 P 376; *State v. Vuckovich*, 61 M 480, 491, 203 P 491; *State v. Griebel*, 65 M 390, 395, 211 P 321; *In re Lockhart*, 72 M 136, 145, 232 P 183; *State v. Thierfelder*, 114 M 104, 110, 132 P 2d 1035.

Indictment and Information—57.

42 C.J.S. Indictments and Informations § 90.

27 Am. Jur. 608, Indictments and Informations, §§ 35 et seq.

him instead of by the county attorney did not render it invalid; at most his act, while perhaps improper from an ethical standpoint, was no more than an irregularity which could not affect appellant's substantial rights and was therefore insufficient to warrant reversal of the judgment under this section. *State v. Larson*, 75 M 274, 276, 243 P 566.

Misspelling of "Deliberately" Held Immaterial

Under this section and section 94-6434 an information alleging that defendant feloniously, wilfully, and of his "deliberately" premeditated malice aforethought committed the homicide in question, was not fatally defective because of the mere misspelling of the word "deliberately." *State v. Lu Sing*, 34 M 31, 35, 85 P 521.

Operation and Effect Generally

An information charging an attempt to obtain money by false pretenses, though defective in form and containing immaterial averments, is held sufficient to sustain a conviction, when it is apparent that the defendant has suffered no prejudice. *State v. Phillips*, 36 M 112, 118, 92 P 299.

Superfluous Words or Sentences Held Immaterial

Superfluous words or sentences inserted

in an information charging crime may be treated as surplusage and disregarded, if, without such words and sentences, it sufficiently charges the offense alleged to have been committed. *State v. McGowan*, 36 M 422, 427, 93 P 552.

An information charging murder in the first degree, otherwise sufficient, was not rendered insufficient by the absence of the words "a felony," after the words "murder in the first degree," hence the insertion of the two words by order of court upon complaint that the copy served upon defendant did not contain them did not render the information subject to a motion to quash. *State v. Vuckovich*, 61 M 480, 491, 203 P 491.

Time and Place Are Essential

While in this state much of the particularity required at the common law has been dispensed with, and no defect or imperfection in form, which does not prejudice, the substantial rights of the defendant, can affect a judgment of conviction, still time and place are essential elements, and must be so alleged as to enable a person of common understanding to know what is intended by the charge. *State v. Beesskove*, 34 M 41, 50, 85 P 376.

94-6414. (11854) **Presumptions of law, etc., need not be stated.** Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in an indictment or information.

History: En. Sec. 90, p. 232, *Bannack Stat.*; re-en. Sec. 172, p. 217, *Cod. Stat.* 1871; re-en. Sec. 172, 3d Div. *Rev. Stat.* 1879; re-en. Sec. 172, 3d Div. *Comp. Stat.* 1887; amd. Sec. 1843, *Pen. C.* 1895; re-en. Sec. 9158, *Rev. C.* 1907; re-en. Sec. 11854, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 961.

Operation and Effect

Held that the courts take judicial notice of the fact that morphine is a derivative of opium, and therefore under this section providing that matters of which judicial notice is taken need not be alleged in an

94-6415. (11855) **Judgments, etc., how pleaded.** In pleading a judgment or other determination of, or proceeding before a court or officer of special jurisdiction, it is not necessary to state the facts constituting jurisdiction; but the judgment or determination may be stated as given or made, or the proceedings had. The facts constituting jurisdiction, however, must be established on the trial.

History: En. Sec. 91, p. 232, *Bannack Stat.*; re-en. Sec. 173, p. 217, *Cod. Stat.* 1871; re-en. Sec. 173, 3d Div. *Rev. Stat.* 1879; re-en. Sec. 173, 3d Div. *Comp. Stat.* 1887; amd. Sec. 1844, *Pen. C.* 1895; re-en.

When Remarks by Trial Judge Will Be Held Immaterial

While not subscribing to the doctrine that only objectionable remarks addressed to the jury and not those addressed to counsel during the trial in the presence of the jury may be considered prejudicial, where the court after each of such remarks cautions the jury to disregard them in arriving at their verdict, the error will be deemed cured except in instances of gross impropriety. *State v. Dixon*, 80 M 181, 213, 260 P 138.

References

Cited or applied as section 1842, *Penal Code*, in *State v. Bloor*, 20 M 574, 582, 52 P 611; *State v. Gill*, 21 M 151, 153, 53 P 184; *State v. Stickney*, 29 M 523, 529, 75 P 201; as section 9157, *Revised Codes*, in *State v. Reed*, 53 M 292, 299, 163 P 477; *State v. Hem*, 69 M 57, 62, 63, 220 P 80; *In re Lockhart*, 72 M 136, 145, 232 P 183; *State v. Fisher*, 79 M 46, 52, 254 P 872; *State v. Stevens*, 104 M 189, 197, 65 P 2d 612; *State v. Laughlin*, 105 M 490, 496, 73 P 2d 718; *State v. Wong Sun*, 114 M 185, 190, 133 P 2d 761.

Criminal Law 1186 (4).
24 C.J.S. *Criminal Law* § 1948.

information or indictment, a charge that defendant unlawfully, feloniously, etc., sold a certain quantity of morphine was sufficient, as against the contention that it was fatally defective for failure to aver that morphine is a derivative of opium. *State v. Vallie*, 82 M 456, 463, 268 P 493.

References

State v. Griebel, 65 M 390, 395, 211 P 321.

Indictment and Information 61, 62.
42 C.J.S. *Indictments and Informations* §§ 99, 100, 113.

Sec. 9159, *Rev. C.* 1907; re-en. Sec. 11855, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 962.

Judgment 949 (2).
50 C.J.S. *Judgments* §§ 827, 833.

94-6416. (11856) **Private statutes, how pleaded.** In pleading a private statute, or a right derived therefrom, it is sufficient to refer to the statute

by its title and the day of its passage, and the court must thereupon take judicial notice thereof.

History: En. Sec. 92, p. 232, Bannack Stat.; re-en. Sec. 174, p. 217, Cod. Stat. 1871; re-en. Sec. 174, 3d Div. Rev. Stat. 1879; re-en. Sec. 174, 3d Div. Comp. Stat. 1887; amd. Sec. 1845, Pen. C. 1895; re-en.

Sec. 9160, Rev. C. 1907; re-en. Sec. 11856, R. C. M. 1921. Cal. Pen. C. Sec. 963.

Statutes 280.

59 C.J. Statutes § 741 et seq.

94-6417. (11857) Pleading for libel. An indictment or information for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled, of the defamatory matter on which the indictment or information is founded; but it is sufficient to state generally, that the same was published concerning him, and the fact that it was so published must be established on the trial.

History: En. Sec. 190, p. 218, Cod. Stat. 1871; re-en. Sec. 190, 3d Div. Rev. Stat. 1879; re-en. Sec. 190, 3d Div. Comp. Stat. 1887; amd. Sec. 1846, Pen. C. 1895; re-en. Sec. 9161, Rev. C. 1907; re-en. Sec. 11857, R. C. M. 1921. Cal. Pen. C. Sec. 964.

Libel and Slander 152 (4).

37 C.J. Libel and Slander § 675.

33 Am. Jur. 301, Libel and Slander, §§ 323 et seq.

94-6418. (11858) Pleading for forgery, where instrument has been destroyed or withheld by defendant. When an instrument which is the subject of an indictment or information for forgery has been destroyed or withheld by the act or the procurement of the defendant, and the fact of such destruction or withholding is alleged in the indictment or information, and established on the trial, the misdescription of the instrument is immaterial.

History: En. Sec. 191, p. 219, Cod. Stat. 1871; re-en. Sec. 191, 3d Div. Rev. Stat. 1879; re-en. Sec. 191, 3d Div. Comp. Stat. 1887; amd. Sec. 1847, Pen. C. 1895; re-en.

Sec. 9162, Rev. C. 1907; re-en. Sec. 11858, R. C. M. 1921. Cal. Pen. C. Sec. 965.

Forgery 28 (5).

37 C.J.S. Forgery § 57.

94-6419. (11859) Pleading for perjury or subornation of perjury. In an indictment or information for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and in what court and before whom the oath alleged to be false was taken, and that the court, or person before whom it was taken, had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment or information need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed.

History: En. Sec. 192, p. 219, Cod. Stat. 1871; re-en. Sec. 192, 3d Div. Rev. Stat. 1879; re-en. Sec. 192, 3d Div. Comp. Stat. 1887; amd. Sec. 1848, Pen. C. 1895; re-en. Sec. 9163, Rev. C. 1907; re-en. Sec. 11859, R. C. M. 1921. Cal. Pen. C. Sec. 966.

Operation and Effect

An information charging perjury as having been committed in swearing at a criminal trial that a certain event happened at 11 o'clock, without stating whether it was in the morning or at night, held not insufficient, where any person of ordinary intelligence could not, from a reading of

other portions of the pleading, have arrived at any other conclusion than that it meant 11 o'clock in the forenoon; nor was it rendered insufficient by the ungrammatical use of the word "knowing" where "knowingly" should have been employed. *State v. Jackson*, 88 M 420, 428, 293 P 309.

Id. If an information for perjury sets forth the substance of the matter in respect to which the offense was committed, in what court and before whom the oath alleged to have been false was taken, and that the court or the person before whom it was taken had authority to administer it, with proper allegations of the falsity

of the matter on which perjury is assigned, it is sufficient.

Perjury \S 19 (1) et seq.

48 C.J. Perjury \S 104.

41 Am. Jur., Perjury, p. 20, $\S\S$ 33 et seq.; p. 41, \S 75.

Description in indictment of proceeding in which perjury was committed. 24 ALR 1137.

Sufficiency of general averment as to materiality of false statement. 80 ALR 1443.

94-6420. (11860) Pleading for larceny or embezzlement. In an indictment or information for the larceny or embezzlement of money, banknotes, certificates of stock, or valuable securities, or for a conspiracy to cheat or defraud a person of any such property, it is sufficient to allege larceny or embezzlement, or the conspiracy to cheat and defraud, to be of money, banknotes, certificates of stock, or valuable securities, without specifying the coin, number, denomination, or kind thereof.

History: En. Sec. 1849, Pen. C. 1895; re-en. Sec. 9164, Rev. C. 1907; re-en. Sec. 11860, R. C. M. 1921. Cal. Pen. C. Sec. 967.

Operation and Effect

In an information charging larceny by a bailee it is not necessary to describe the money. State v. Hall, 45 M 498, 125 P 639.

While shares of stock of a corporation constitute the property and a certificate representing them is only evidence of the property, yet since title to the shares may be transferred by the certificate and the distinction between the stock and the certificate is largely artificial, the certificate like the stock, is the subject of larceny. State v. Letterman, 88 M 244, 255, 292 P 717.

References

State v. Dimond, 82 M 110, 112, 265 P 5.

Embezzlement \S 28; Larceny \S 30 (7-11). 29 C.J.S. Embezzlement \S 29; 36 C.J. Larceny \S 275 et seq.

18 Am. Jur. 599, Embezzlement, \S 44; 32 Am. Jur. 1018, Larceny, $\S\S$ 106 et seq.

Laying ownership of property in husband or wife. 2 ALR 352.

Necessity of alleging incorporation or legal entity of owner of property not a natural person. 88 ALR 485.

Sufficiency of description of automobile or automobile equipment or accessories in indictment for larceny. 100 ALR 791.

Indictment for larceny of real property or things savoring of real property. 131 ALR 146.

94-6421. (11861) Pleading for selling, exhibiting, etc., lewd and obscene books. An indictment or information for exhibiting, publishing, passing, selling, or offering to sell, or having in possession, with such intent, any lewd or obscene book, pamphlet, picture, print, card, paper, or writing, need not set forth any portion of the language used or figures shown upon such book, pamphlet, picture, print, card, paper, or writing; but it is sufficient to state generally the fact of the lewdness or obscenity thereof.

History: En. Sec. 1850, Pen. C. 1895; re-en. Sec. 9165, Rev. C. 1907; re-en. Sec. 11861, R. C. M. 1921. Cal. Pen. C. Sec. 968.

Obscenity \S 12.

46 C.J. Obscenity \S 29.

94-6422. (11862) Indictment against several, one or more may be acquitted. Upon an indictment or information against several defendants, any one or more may be convicted or acquitted.

History: En. Sec. 93, p. 232, Bannack Stat.; re-en. Sec. 175, p. 217, Cod. Stat. 1871; re-en. Sec. 175, 3d Div. Rev. Stat. 1879; re-en. Sec. 175, 3d Div. Comp. Stat. 1887; amd. Sec. 1851, Pen. C. 1895; re-en.

Sec. 9166, Rev. C. 1907; re-en. Sec. 11862, R. C. M. 1921. Cal. Pen. C. Sec. 970.

Criminal Law \S 877.

23 C.J.S. Criminal Law \S 1402.

94-6423. (11863) Distinction between accessory before the fact and principal abrogated. The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of

a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, must be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory, than are required in an indictment or information against his principal.

History: En. Sec. 1852, Pen. C. 1895; re-en. Sec. 9167, Rev. C. 1907; re-en. Sec. 11863, R. C. M. 1921. Cal. Pen. C. Sec. 971.

"Advise and Encourage"

An instruction should follow the language of the statute, and state that accessories are those who "advise and encourage," instead of "advise or encourage," the commission of crime. *State v. Geddes*, 22 M 68, 88, 55 P 919.

Confusing Prior Knowledge with Aiding or Abetting

The mere knowledge in a person that a crime is about to be committed does not constitute him an accomplice; nor does the fact that one charged with receiving stolen property, on prior occasions may have purchased such property seem sufficient to make the receiver an accomplice in the particular theft nor even to give him the knowledge that it was to be committed. *State v. Mercer*, 114 M 142, 149, 133 P 2d 358.

Constitutionality

This section does not violate the provision of the constitution guaranteeing to an accused the right to demand the nature and cause of the accusation. *State v. Geddes*, 22 M 68, 87, 55 P 919.

Object of Statute

The object of the code was to put the principal and the agent upon the same legal ground, and to authorize the principal to be charged as if he himself had committed the felony in fact perpetrated by his agent by his advice and encouragement. *State v. Geddes*, 22 M 68, 88, 55 P 919.

Operation and Effect

An indictment for murder, charging defendant as principal, is sustained by proof that he was guilty of advising and encouraging the crime. *State v. Geddes*, 22 M 68, 86, 55 P 919.

The distinction between accessories before the fact and principals is abrogated, and all are treated as principals. *State v. De Wolfe*, 29 M 415, 423, 74 P 1084.

In a prosecution for arson, where there is some testimony that defendant procured another to set the fire, the giving of instructions, embodying the provisions of this section and section 94-204, is proper; as is also the refusing of others, directing

the jury to find for the defendant, unless they are satisfied beyond a reasonable doubt that he was present personally and set the fire himself. *State v. Chevigny*, 48 M 382, 385, 138 P 257.

Instructions substantially in the words of this section and section 94-204, defining a principal and telling the jury that the distinction between a principal and an accessory had been abrogated by statute, were not improper as implying that a felony had been committed. *State v. Wiley*, 53 M 383, 387, 164 P 84.

Under an information charging receipt of stolen property by one who became a principal because he aided and abetted another in receiving it, the claim of fatal variance between the crime as alleged and the proof, showing him to have taken part only as an accessory, has no merit. *State v. Huffman*, 89 M 194, 203, 296 P 789.

Where a stock detective solicited one to assist him in the larceny of cattle for the purpose of convicting another of the crime, and the person so solicited on arrival at the scene of the intended taking declined to participate, he was not a principal to the crime, and hence, the one upon whom the crime was sought to be fastened, could not, under this section, have become his accessory. *State v. Neely*, 90 M 199, 211, 300 P 561.

Although, under the facts stated, defendant, who it appeared, advised and encouraged the theft of a calf, under sec. 94-204 was an accomplice or accessory before the fact and therefore a principal to the actual theft under this section abrogating the distinction, and by legal fiction had constructive possession, but since he later obtained physical possession, the state may elect to prosecute him for receiving stolen property and his contention that he cannot receive from himself the thing he has stolen is illogically basing further fiction upon fiction, implying that it is impossible to receive actual physical possession as distinguished from constructive possession. *State v. Webber*, 112 M 284, 301, 116 P 2d 679.

References

State v. Bolton, 65 M 74, 81, 212 P 504; *State v. Keays*, 97 M 404, 419, 34 P 2d 855.

Criminal Law—61, 69; Indictment and Information—84.

22 C.J.S. Criminal Law § 90; 42 C.J.S. Indictments and Informations § 148.

94-6424. (11864) Indictment against accessory. An indictment or information against any accessory to any felony may be found in any county where the offense of such accessory may have been committed, notwithstanding the principal offense may have been committed in another county, and the like proceeding may be had therein in all respects, as if the principal offense had been committed in the same county.

History: En. Sec. 186, p. 218, Cod. Stat. 1871; re-en. Sec. 186, 3d Div. Rev. Stat. 1879; re-en. Sec. 186, 3d Div. Comp. Stat. 1887; re-en. Sec. 1853, Pen. C. 1895; re-en. Sec. 9168, Rev. C. 1907; re-en. Sec. 11864, R. C. M. 1921.
Criminal Law 110.
22 C.J.S. Criminal Law § 184.

94-6425. (11865) Accessory may be indicted and tried, though principal has not been. An accessory to the commission of a felony may be prosecuted, tried, and punished, though the principal may be neither prosecuted nor tried, and though the principal may have been acquitted.

History: Ap. p. Sec. 95, p. 232, Bannack Stat.; re-en. Sec. 177, p. 217, Cod. Stat. 1871; re-en. Sec. 177, 3d Div. Rev. Stat. 1879; re-en. Sec. 177, 3d Div. Comp. Stat. 1887; en. Sec. 1854, Pen. C. 1895; re-en. Sec. 9169, Rev. C. 1907; re-en. Sec. 11865, R. C. M. 1921. Cal. Pen. C. Sec. 972.
References
Cited or applied as section 1854, Penal Code, in State v. De Wolfe, 29 M 415, 423, 74 P 1084.
Criminal Law 80.
22 C.J.S. Criminal Law § 104.

94-6426. (11866) Record of indictment or information. Every indictment or information must be recorded by the clerk within five days after the same is filed, in a book to be kept for that purpose. The judge must compare the record with the original indictment or information and certify the correctness thereof. In case the original indictment or information is lost or destroyed, the defendant may be tried upon a copy taken from the record, and certified by the clerk.

History: En. Sec. 96, p. 232, Bannack Stat.; re-en. Sec. 178, p. 217, Cod. Stat. 1871; re-en. Sec. 178, 3d Div. Rev. Stat. 1879; re-en. Sec. 178, 3d Div. Comp. Stat. 1887; amd. Sec. 1855, Pen. C. 1895; re-en. Sec. 9170, Rev. C. 1907; re-en. Sec. 11866, R. C. M. 1921.
Indictment and Information 11 (2), 43.
42 C.J.S. Indictments and Informations §§ 29, 31.
Failure to make proof of loss of indictment and to enter order of substitution of certified copy until after defendant had been arraigned. 133 ALR 1337.

94-6427. (11867) No disclosure prior to arrest. No grand juror, county attorney, clerk, judge, or other officer must disclose the fact that an indictment is found or an information filed until the defendant has been arrested, except any disclosure that may be necessarily incident to the issue and service of a warrant to arrest the defendant. A violation of this section may be punished as a misdemeanor by fine or imprisonment, or both.

History: En. Sec. 99, p. 233, Bannack Stat.; re-en. Sec. 181, p. 218, Cod. Stat. 1871; re-en. Sec. 181, 3d Div. Rev. Stat. 1879; re-en. Sec. 181, 3d Div. Comp. Stat. 1887; amd. Sec. 1856, Pen. C. 1895; re-en. Sec. 9171, Rev. C. 1907; re-en. Sec. 11867, R. C. M. 1921.
District and Prosecuting Attorneys 11; Grand Jury 41.
27 C.J.S. District and Prosecuting Attorneys § 17; 38 C.J.S. Grand Juries § 43.

94-6428. (11868) Of what offense a defendant may be convicted. Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of any crime included in the crime charged, or of an attempt to commit the crime

charged, or of an attempt to commit a lesser degree of the crime charged, or of an attempt to commit any crime included in the crime charged.

History: Ap. p. Sec. 100, p. 233, Bannack Stat.; re-en. Sec. 182, p. 218, Cod. Stat. 1871; re-en. Sec. 182, 3d Div. Rev. Stat. 1879; re-en. Sec. 182, 3d Div. Comp. Stat. 1887; en. Sec. 1857, Pen. C. 1895; re-en. Sec. 9172, Rev. C. 1907; re-en. Sec. 11868, R. C. M. 1921.

Operation and Effect

While the offense of kidnaping includes the minor offenses of false imprisonment and assault in the third degree, the court need not so formulate the charge that the jury may find the defendant guilty of a lower offense or of an included offense, where the evidence is such as to show that defendant is guilty of the offense charged or is entitled to an acquittal. *State v. McDonald*, 51 M 1, 16, 149 P 279.

References

Cited or applied as section 9172, Revised Codes, in *State v. Collins*, 53 M 213, 163 P 102; *State v. Le Due*, 89 M 545, 562, 300 P 919.

Indictment and Information \Rightarrow 189 (1), 190, 191.

42 C.J.S. Indictments and Informations § 278 et seq.

Right of court to accept verdict upon one or more counts of an indictment when jury is unable to reach a verdict on all counts or is silent as to part of counts, and effect of such acceptance. 114 ALR 1406.

94-6429. (11869) Allegation as to partnership property. When any offense is committed upon, or in relation to, any personal property belonging to several partners or owners, the indictment or information for such offense is sufficient if it allege such property to belong to any one or more of such partners or owners without naming them all.

History: En. Sec. 103, p. 233, Bannack Stat.; re-en. Sec. 185, p. 218, Cod. Stat. 1871; re-en. Sec. 185, 3d Div. Rev. Stat. 1879; re-en. Sec. 185, 3d Div. Comp. Stat. 1887; amd. Sec. 1858, Pen. C. 1895; re-en.

Sec. 9173, Rev. C. 1907; re-en. Sec. 11869, R. C. M. 1921.

Indictment and Information \Rightarrow 105.

42 C.J.S. Indictments and Informations § 143.

✓ **94-6430. (11870) Amendment allowed on trial, when.** Upon the trial of an indictment or information, when a variance between the allegation therein and the proof, in respect to time, or in name or description of any place, person or thing, shall appear, the court may, in its judgment, if the defendant cannot be thereby prejudiced in his defense on the merits, direct the indictment or information to be amended, according to the proof, on such terms as to the postponement of the trial, to be had before the same or another jury, as the court may deem reasonable.

History: En. Sec. 1859, Pen. C. 1895; re-en. Sec. 9174, Rev. C. 1907; re-en. Sec. 11870, R. C. M. 1921.

Operation and Effect

An information for the crime of robbery may be amended at the close of the testimony for the state, so as to change the name of the person from whom it is alleged the property was feloniously taken. *State v. Oliver*, 20 M 318, 321, 50 P 1018.

If a crime is charged as having been committed on one date, while the evidence shows that it was done at another time, but within the statute of limitations, the prosecution does not fail, but there is a variance which may be material enough to justify a continuance. *State v. Gaimos*, 53 M 118, 124, 162 P 596.

Power to grant permission to the county attorney in a prosecution under the liquor law to amend the information at the close of the state's case by changing the date on which the offense was charged to have been committed is conferred by this section, and this section is not open to constitutional objection. *State v. Terry*, 77 M 297, 298, 250 P 612.

Where Defendant Without Right to Plead Former Jeopardy—New Trial on Amended Information

When the new trial was granted after defendant was convicted and served about a month in the state prison in a prosecution for the larceny of one of four colts, held that under the liberal rules for amending an information secs. 94-6207 and 94-

6430, the information could have been amended by leave of court to charge the same offense, without violating any right of defendant and without the right of defendant to plead former jeopardy. See section 94-7602. State v. Aus, 105 M 82, 87, 69 P 2d 584.

References

Cited or applied as section 9174, Revised Codes, in State v. Duncan, 40 M 531, 534, 107 P 510; State v. Reed, 53 M 292, 299,

163 P 477; State v. Sedlacek, 74 M 201, 208, 210, 239 P 1002; State v. Fisher, 79 M 46, 52, 254 P 872; State v. Dixon, 80 M 181, 213, 260 P 138.

Indictment and Information⇒160, 161 (8).

42 C.J.S. Indictments and Informations §§ 241, 242.

27 Am. Jur. 675, Indictments and Informations, §§ 115 et seq.

94-6431. (11871) Trial to proceed. After such amendment, the trial, whenever the same shall be proceeded with, must proceed in the same manner and with the same consequences as if no such variance had occurred.

History: En. Sec. 1860, Pen. C. 1895; re-en. Sec. 9175, Rev. C. 1907; re-en. Sec. 11871, R. C. M. 1921.

94-6432. (11872) Effect of verdict. A verdict and judgment which is given after the making of any such amendment is of the same force and effect as if the indictment or information had originally been found in its amended form.

History: En. Sec. 1861, Pen. C. 1895; re-en. Sec. 9176, Rev. C. 1907; re-en. Sec. 11872, R. C. M. 1921.

94-6433. (11873) Affidavits defectively entitled, valid. It is not necessary to entitle an affidavit or deposition in the action, whether taken before or after information, or after indictment, or upon an appeal; but if made without a title, or with an erroneous title, it is as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refer to the proceeding, indictment, information, or appeal in which it is made.

History: En. Sec. 2590, Pen. C. 1895; re-en. Sec. 9547, Rev. C. 1907; re-en. Sec. 11873, R. C. M. 1921. Cal. Pen. C. Sec. 1401.

Affidavits⇒7; Depositions⇒74.

2 C.J.S. Affidavits § 13; 26 C.J.S. Depositions § 75.

94-6434. (11874) When not material. Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right.

History: En. Sec. 2600, Pen. C. 1895; re-en. Sec. 9548, Rev. C. 1907; re-en. Sec. 11874, R. C. M. 1921. Cal. Pen. C. Sec. 1404.

Apex Juris not Sufficient to Reverse

Where no substantial right of the defendant has been disregarded, a mere apex juris is not sufficient cause for the reversal or modification of the judgment. State v. Connors, 27 M 227, 229, 70 P 715.

Clerical Mistake not Reversible Error

Information inadvertently charging that defendant on a certain day in the year "19122" sold intoxicating liquor held not to have prejudiced him in any substantial

right, where evidence of a sale made on that day in the year 1922 was admitted without objection by defendant and he was prepared to meet the charge on the assumption that that was the correct date, introduced evidence tending to establish an alibi and offered no objection to an instruction advising the jury that if they found that the sale was made on that day they must find him guilty. State v. Polich, 70 M 523, 526, 226 P 519.

Improper Remark of Judge

A remark of the trial judge in passing upon an objection to a question asked a witness for the defense in a criminal cause to the effect: "I don't think that is very

material; let him answer," while improper, held technical error and nonprejudicial when considered in connection with the particular circumstances. *State v. Cassill et al.*, 71 M 274, 283, 229 P 716.

Misspelling of "Deliberately" not Sufficient to Make Invalid

Under this section and section 94-6413 an information alleging that defendant feloniously, wilfully, and of his "deliberately" premeditated malice aforethought, committed the homicide in question, was not fatally defective because of the mere misspelling of the word "deliberately." *State v. Lu Sing*, 34 M 31, 35, 85 P 521.

Omission from Minutes Relative to Calling of Names of Jurors not Reversible

Where the record in a criminal cause did not show that the jurors were not all present when the verdict was delivered, and from the minutes no other fair inference could be drawn than that they were actually present at the time, the omission from the minutes of a statement that their names were called prior to the delivery of the verdict was not an error which prejudiced defendant in his substantial rights. *State v. De Lea*, 36 M 531, 536, 93 P 814.

Operation and Effect

Query, as to whether the rule, that "error appearing, prejudice will be presumed," as announced prior to the adoption of the codes in 1895, was abrogated by this section and section 94-8207, which declare the law to be that no judgment shall be held invalid for mere technical errors not affecting the substantial rights of the defendant. *State v. Gordon*, 35 M 458, 466, 90 P 173.

An information charging an attempt to obtain money by false pretenses, though defective in form and containing immaterial averments, is sufficient to sustain a conviction, when it is apparent that the defendant has suffered no prejudice. *State v. Phillips*, 36 M 112, 118, 92 P 299.

A judgment of conviction will not be reversed for error in the trial proceedings, unless it has prejudiced, or tended to prejudice, the defendant in respect to a substantial right. *State v. Rhys*, 40 M 131, 134, 105 P 494.

While under section 94-6407, an information must charge but one offense, under section 94-6802, any number of offenses against the Prohibition Act may be charged in separate counts in one information and where defendant pleaded to the information in a liquor prosecution containing a number of counts, any informality in that respect did not tend to his prejudice and must,

therefore, be disregarded on appeal. *State v. Grasswick*, 77 M 326, 329, 250 P 613.

Technical Error in Instruction not Reversible Error

Where, under the evidence submitted at a trial for assault in the second degree, the defendant might have been convicted of assault in either the second or third degree, but was found guilty of the lower degree, the judgment will not be reversed for a purely technical error in giving an instruction. *State v. Tracey*, 35 M 552, 555, 90 P 791.

Technical Error in Pleading a Prior Conviction not Reversible Error

A technical error in pleading a prior conviction in another state will not work a reversal if the punishment imposed does not exceed the proper limit. *State v. Paisley*, 36 M 237, 248, 92 P 566.

Time and Place are Essential

While in this state much of the particularity required at the common law has been dispensed with, and no defect or imperfection in form, which does not prejudice the substantial rights of the defendant, can affect a judgment of conviction, still time and place are essential elements, and must be so alleged as to enable a person of common understanding to know what is intended by the charge. *State v. Beesskove*, 34 M 41, 50, 85 P 376.

Variance not Reversible Error When

While defendant was furnished a bill of particulars showing that while the information charged the violation of the liquor law on a certain date, the state would rely on proof of a sale made on a different date and during the trial the court inquired of him whether he had been taken by surprise, and he declined to state that he was surprised and did not ask for a continuance, he was in no position to claim prejudice by the introduction of proof relating to a sale made on the latter date, he not having been injured by the variance, if any. *State v. Knilians*, 69 M 8, 13, 220 P 91.

Where the information charged defendant with a sale of "certain spirituous liquid containing more than one-half of one per centum of alcohol by volume which was fit for beverage purposes," but the proof showed the sale of moonshine whisky, a liquor different from that described in the information, there was a variance which, however, was not fatal, it appearing that defendant was as fully prepared to meet the proof made by the state as he would have been to meet that of the charge contained in the information. *State v. Sedlacek*, 74 M 201, 208, 239 P 1002.

Wrongful Indorsement of Name of Witness not Reversible Error

Where a county attorney violated the express injunction of section 94-6208 by indorsing the name of a witness as "John Doe Mitchell," whereas he knew his true name to be "James Mitchell," defendant was not entitled to a new trial in the absence of a showing that he had been prejudiced by the officer's delinquency. *State v. McDonald*, 51 M 1, 7, 149 P 279.

References

Cited or applied as section 9548, Revised Codes, in *State v. Vanella*, 40 M 326, 345, 106 P 364; *State v. Crean*, 43 M 47, 60, 114 P 603; *State v. Murphy*, 46 M 591, 129 P 1058; *State v. Jones*, 48 M 505, 515, 139 P 441; *State v. Russell*, 52 M 583, 160 P 655; *State v. Murphy*, 68 M 427, 431, 219 P 629; *State v. Stevens*, 104 M 189, 197, 65 P 2d 612.

Criminal Law Ⓒ1186 (4).
24 C.J.S. Criminal Law § 1948.

CHAPTER 65**ARRAIGNMENT OF DEFENDANT**

- Section 94-6501. Defendant must be arraigned in the court where the indictment or information is filed or transferred.
- 94-6502. Defendant, when to be present at arraignment.
- 94-6503. If in custody, to be brought before court.
- 94-6504. If discharged on bail, warrant to issue.
- 94-6505. Warrant, by whom and how issued.
- 94-6506. Form of warrant.
- 94-6507. Directions in the warrant.
- 94-6508. Warrant, how served.
- 94-6509. Proceedings on giving bail in another county.
- 94-6510. Ordering defendant into custody or increasing bail when information is for felony.
- 94-6511. Defendant, if present when order made, to be committed—if not, warrant to issue.
- 94-6512. Right to counsel on arraignment.
- 94-6513. Compensation of attorney for accused.
- 94-6514. Arraignment, how made.
- 94-6515. Proceedings on arraignment, when defendant is not indicted by his true name.
- 94-6516. Time allowed and how defendant may answer on arraignment.

94-6501. (11875) Defendant must be arraigned in the court where the indictment or information is filed or transferred. When the indictment or information is filed, the defendant must be arraigned thereon before the court in which it is filed, unless the cause is transferred to some other county for trial.

History: For early act relating to arraignment and plea, corresponding to the sections in this chapter, see Secs. 129-153, p. 236-241, *Bannack Stat.*; Secs. 193-224, p. 220-223, *Cod. Stat. 1871*; Secs. 193-224, 3d Div. Rev. Stat. 1879; Secs. 193-225, 3d Div. Comp. Stat. 1887.

This section en. Sec. 1880, Pen. C. 1895; re-en. Sec. 9177, Rev. C. 1907; re-en. Sec. 11875, R. C. M. 1921. Cal. Pen. C. Sec. 976.

References

Cited or applied as section 1880, Penal Code, in *State v. De Wolfe*, 29 M 415, 418, 74 P 1084; *State v. Grasswick*, 77 M 326, 328, 250 P 613.

Criminal Law Ⓒ261 (1).
22 C.J.S. Criminal Law § 407.
14 Am. Jur. 939, Criminal Law, §§ 249-256.

94-6502. (11876) Defendant, when to be present at arraignment. If the indictment or information be for felony, the defendant must be personally present; but if for a misdemeanor, he may appear upon the arraignment by counsel.

History: En. Sec. 199, p. 220, *Cod. Stat. 1871*; re-en. Sec. 199, 3d Div. Rev. Stat. 1879; re-en. Sec. 200, 3d Div. Comp. Stat.

1887; amd. Sec. 1881, Pen. C. 1895; re-en. Sec. 9178, Rev. C. 1907; re-en. Sec. 11876, R. C. M. 1921. Cal. Pen. C. Sec. 977.

Criminal Law 264.

22 C.J.S. Criminal Law §§ 411, 412.

94-6503. (11877) If in custody, to be brought before court. When his personal appearance is necessary, if he is in custody, the court may direct and the officer in whose custody he is, must bring him before it to be arraigned.

History: Ap. p. Sec. 193, p. 220, Cod. Stat. 1887; amd. Sec. 1882, Pen. C. 1895; Stat. 1871; re-en. Sec. 193, 3d Div. Rev. re-en. Sec. 9179, Rev. C. 1907; re-en. Sec. Stat. 1879; re-en. Sec. 193, 3d Div. Comp. 11877, R. C. M. 1921. Cal. Pen. C. Sec. 978.

94-6504. (11878) If discharged on bail, warrant to issue. If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear to be arraigned when his personal attendance is necessary, the court, in addition to the forfeiture of the undertaking of bail or of money deposited, may direct the clerk to issue a warrant for his arrest.

History: En. Sec. 1883, Pen. C. 1895; Criminal Law 263.
re-en. Sec. 9180, Rev. C. 1907; re-en. Sec. 22 C.J.S. Criminal Law § 404.
11878, R. C. M. 1921. Cal. Pen. C. Sec. 979.

94-6505. (11879) Warrant, by whom and how issued. The clerk on the application of the county attorney may, at any time after the order, whether the court is sitting or not, issue a warrant to one or more counties.

History: En. Sec. 1884, Pen. C. 1895;
re-en. Sec. 9181, Rev. C. 1907; re-en. Sec.
11879, R. C. M. 1921. Cal. Pen. C. Sec. 980.

94-6506. (11880) Form of warrant. The warrant upon the indictment or information must, if the offense is a felony, be substantially in the following form:

"In the district court of the district in and for the county of The State of Montana: To any sheriff, constable, marshal, or policeman in this state: An indictment having been found (or information filed) on the day of, A. D. nineteen, in the district court of the county of, charging C D with the crime of (designating it generally); you are, therefore, commanded forthwith to arrest the above named C D, and bring him before that court (or if the indictment or information has been sent to another court, then before that court, naming it) to answer said indictment (or information); or if the court be not in session, that you deliver him into the custody of the sheriff of the county of"

Given under my hand, with the seal of said court affixed, this day of, A. D. Clerk."
[Seal.]

History: En. Sec. 1885; Pen. C. 1895;
re-en. Sec. 9182, Rev. C. 1907; re-en. Sec.
11880, R. C. M. 1921. Cal. Pen. C. Sec. 981.

94-6507. (11881) Directions in the warrant. The defendant, when arrested under a warrant for an offense not bailable, must be held in custody by the sheriff of the county in which the indictment is found on information filed, unless admitted to bail after an examination upon a writ of habeas corpus; but if the offense is bailable, there must be added to the body of the warrant a direction to the following effect: "Or, if he require it, that you

take him before any magistrate in that county, or in the county in which you arrest him, that he may give bail to answer to the indictment or information," and the court, upon directing it to issue, must fix the amount of bail, and an indorsement must be made thereon and signed by the clerk, to the following effect: "The defendant is to be admitted to bail in the sum of dollars."

History: En. Sec. 1886, Pen. C. 1895; Bail 49; Criminal Law 263.
re-en. Sec. 9183, Rev. C. 1907; re-en. Sec. 8 C.J.S. Bail §§ 34, 36, 44; 22 C.J.S.
11881, R. C. M. 1921. Cal. Pen. C. Sec. 982. Criminal Law § 404.

94-6508. (11882) Warrant, how served. The warrant may be served in any county, in the same manner as a warrant of arrest, as provided in sections 94-5901 to 94-5918.

History: En. Sec. 1887, Pen. C. 1895;
re-en. Sec. 9184, Rev. C. 1907; re-en. Sec.
11882, R. C. M. 1921. Cal. Pen. C. Sec. 983.

94-6509. (11883) Proceedings on giving bail in another county. If the defendant is brought before a magistrate of another county for the purpose of giving bail, the magistrate must proceed in respect thereto, in the same manner as if the defendant had been brought before him upon a warrant of arrest, and the same proceedings must be had thereon.

History: En. Sec. 1888, Pen. C. 1895;
re-en. Sec. 9185, Rev. C. 1907; re-en. Sec.
11883, R. C. M. 1921. Cal. Pen. C. Sec. 984.

94-6510. (11884) Ordering defendant into custody or increasing bail when information is for felony. When the information is for a felony, and the defendant before the filing thereof, has given bail for his appearance to answer the charge, the court to which the information is presented, or in which it is pending, may order the defendant to be committed to actual custody, unless he gives bail in an increased amount, to be specified in the order.

History: En. Sec. 1889, Pen. C. 1895; Bail 53.
re-en. Sec. 9186, Rev. C. 1907; re-en. Sec. 8 C.J.S. Bail § 51.
11884, R. C. M. 1921. Cal. Pen. C. Sec. 985.

94-6511. (11885) Defendant, if present when order made, to be committed—if not, warrant to issue. If the defendant is present when the order is made, he must be forthwith committed. If he is not present, a warrant must be issued and proceeded upon in the manner provided in this chapter.

History: En. Sec. 1890, Pen. C. 1895;
re-en. Sec. 9187, Rev. C. 1907; re-en. Sec.
11885, R. C. M. 1921. Cal. Pen. C. Sec. 986.

94-6512. (11886) Right to counsel on arraignment. If the defendant appear for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him.

History: Ap. p. Sec. 196, p. 220, Cod.
Stat. 1871; re-en. Sec. 196, 3d Div. Rev.
Stat. 1879; re-en. Sec. 196, 3d Div. Comp.
Stat. 1887; en. Sec. 1891, Pen. C. 1895;
re-en. Sec. 9188, Rev. C. 1907; re-en. Sec.
11886, R. C. M. 1921. Cal. Pen. C. Sec. 987.

Operation and Effect

On his arraignment defendant informed the court that he did not wish to employ counsel, and was admitted to bail, furnishing a \$10,000 cash bail bond. On the day of trial, four months thereafter, he stated

to the court that he was without counsel to defend him, but did not ask for time to procure counsel. Held, that nothing short of refusal by the court, on application for time to procure counsel will justify a conclusion that defendant was denied his constitutional right to be heard by counsel. *State v. Fowler*, 59 M 346, 354, 196 P 992.

Where defendant accused of crime did not make a motion to have the minutes of the court corrected to show, as he claimed, that he was arraigned before he was advised of his right to have counsel, contrary to this section, his affidavit con-

tradicting the court minutes in that regard, held insufficient, in the absence of a showing of prejudice, to overcome the presumption that the court performed its judicial duty seasonably and with due regularity. *State v. Murphy*, 68 M 427, 429, 219 P 629.

References

Betts v. Brady, Warden, 316 U. S. 455, 470, 86 L. Ed. 1595, 62 Sup. Ct. 1252.

14 Am. Jur. 941, Criminal Law, § 251.

94-6513. (11887) Compensation of attorney for accused. Whenever, in a criminal action or proceeding in the district court, an attorney-at-law defends a person charged with any offense, by order of the court, on the ground that the accused is unable to procure or employ counsel, the county in which such criminal action or proceeding may have arisen is liable to pay such attorney for his services such sum as the judge certifies to be a reasonable compensation therefor, not to exceed, in any capital case, the sum of one hundred dollars; in other cases of felony a sum not exceeding fifty dollars; and in all other cases a sum not exceeding twenty-five dollars.

History: En. Sec. 1, p. 12, L. 1881; re-en. Sec. 197, 3d Div. Comp. Stat. 1887; amd. Sec. 1892, Pen. C. 1895; amd. Sec. 1, Ch. 33, L. 1903; re-en. Sec. 9189, Rev. C. 1907; re-en. Sec. 11887, R. C. M. 1921.

Operation and Effect

Held, that under this section providing that when an attorney by order of court defends an indigent person charged with crime, the county is liable for the attorney's fee to be fixed by the court not exceeding in a capital case, the sum of \$100, the court is not limited to the appoint-

ment of one attorney but may appoint more if the gravity of the offense warrants it, and if so each is entitled to compensation. *Huntington v. Yellowstone County*, 80 M 20, 25, 257 P 1041.

References

Cited or applied as section 9189, Revised Codes, in *State ex rel. McGrade v. District Court*, 52 M 371, 376, 157 P 1157.

Attorney and Client—132.

7 C.J.S. Attorney and Client § 172.

94-6514. (11888) Arraignment, how made. The arraignment must be made by the court, or by the clerk or county attorney under its direction, and consists in reading the indictment or information to the defendant and delivering to him a copy thereof, and of the indorsements thereon, including the list of witnesses, and asking him whether he pleads guilty or not guilty to the indictment or information.

History: En. Sec. 1893, Pen. C. 1895; re-en. Sec. 9190, Rev. C. 1907; re-en. Sec. 11888, R. C. M. 1921. Cal. Pen. C. Sec. 988.

Operation and Effect

The "copy" of the information required to be delivered to the defendant by this section means a true copy, and there can be no arraignment unless such true copy is furnished. *State v. De Wolfe*, 29 M 415, 418, 74 P 1084.

It would appear from this section that the indorsements on the information are

not considered part of the information. *State v. De Lea*, 36 M 531, 533, 93 P 814.

References

Cited or applied as section 1893, Penal Code, in *State v. Broadbent*, 19 M 467, 469, 48 P 775; *State v. Murphy*, 68 M 427, 429, 219 P 629; *State v. Grasswick*, 77 M 326, 328, 250 P 613.

14 Am. Jur. 939, Criminal Law, §§ 249-256.

94-6515. (11889) Proceedings on arraignment, when defendant is not indicted by his true name. When the defendant is arraigned, he must be in-

formed that if the name by which he is prosecuted is not his true name, he must then declare his true name, or be proceeded against by the name in the indictment or information. If he gives no other name, the court may proceed accordingly; but if he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the information or indictment may be had against him by that name, referring also to the name by which he was first charged therein.

History: En. Secs. 200-202, p. 221, Cod. Stat. 1871; re-en. Secs. 200-202, 3d Div. Rev. Stat. 1879; re-en. Secs. 201-203, 3d Div. Comp. Stat. 1887; amd. Sec. 1894,

Pen. C. 1895; re-en. Sec. 9191, Rev. C. 1907; re-en. Sec. 11889, R. C. M. 1921. Cal. Pen. C. Sec. 989.

94-6516. (11890) Time allowed and how defendant may answer on arraignment. If, on the arraignment, the defendant requires it, he must be allowed a reasonable time, not less than one day, to answer the indictment or information. He may, in his answer to the arraignment, move to set aside, demur, or plead to the indictment or information.

History: En. Secs. 203, 204, p. 221, Cod. Stat. 1871; re-en. Secs. 203, 204, 3d Div. Rev. Stat. 1879; re-en. Secs. 204, 205, 3d Div. Comp. Stat. 1887; amd. Sec. 1895, Pen. C. 1895; re-en. Sec. 9192, Rev. C. 1907; re-en. Sec. 11890, R. C. M. 1921. Cal. Pen. C. Sec. 990.

the copy of the information furnished him was materially different from the information on which he was about to be tried, which objection the court sustained, and required defendant to be furnished with a true copy, as required by section 94-6514, a refusal of the request constitutes reversible error under this section; the record showing that no plea was entered at the trial. *State v. De Wolfe*, 29 M 415, 418, 74 P 1084.

Cross-Reference

Demurrer to indictment, sec. 94-6702.

Operation and Effect

Where defendant, in a prosecution for grand larceny, raised the objection that

Criminal Law 265, 268.

22 C.J.S. Criminal Law §§ 410, 420.

CHAPTER 66

SETTING ASIDE THE INDICTMENT OR INFORMATION

- Section 94-6601. Indictment, when set aside on motion.
 94-6602. Defendant waives objections, unless he makes the motion.
 94-6603. Motion, when heard—if denied or granted, what proceedings are to be had.
 94-6604. Effect of order for resubmission.
 94-6605. Order no bar to another prosecution.

94-6601. (11891) Indictment, when set aside on motion. The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases: If it be an indictment—

1. Where it is not found, indorsed, and presented as prescribed in this code;
2. When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon;
3. When a person is permitted to be present during the session of the grand jury, and when the charge embraced in the indictment is under consideration, except as provided in section 94-6324;
4. That the names of the witnesses for the state are not indorsed thereon;

5. On any ground which would have been good ground for challenge, either to the panel or to any individual grand juror.

If it be an information—

1. That leave to file the same had not been granted by the court;
2. That before the filing thereof the defendant had not been legally committed by a magistrate;
3. That it was not subscribed by the county attorney, or attorney prosecuting.

History: Ap. p. Sec. 205, p. 221, Cod. Stat. 1871; re-en. Sec. 205, 3d Div. Rev. Stat. 1879; re-en. Sec. 206, 3d Div. Comp. Stat. 1887; en. Sec. 1910, Pen. C. 1895; re-en. Sec. 9193, Rev. C. 1907; re-en. Sec. 11891, E. C. M. 1921. Cal. Pen. C. Sec. 995.

Filing of Information Without Preliminary Examination Permissible

The right of the court to grant leave to file an information without previous examination by a committing magistrate is settled law in this State. It is authorized by the constitution art. III sec. 8, confirmed by numerous decisions of the court, and there can be no interpretation put upon any statute which will take it away. *State v. Brett*, 16 M 360, 40 P 873; *State v. Bowser*, 21 M 133, 53 P 179, 180; *State v. Foot*, 100 M 33, 39, 48 P 2d 1113.

Motion Must be in Writing

The motion must be in writing, subscribed by the defendant or his counsel, and must specify the particular ground of objection. *State v. Chevigny*, 48 M 382, 384, 138 P 257.

Motion Proper Remedy When Information Has Been Filed Without Leave of Court

When an information has been filed without leave of court and before the examination and commitment of the defendant, an appropriate remedy is by motion to quash, upon the ground that the information was not presented as prescribed by law. *State v. McCaffery*, 16 M 33, 37, 40 P 63.

Operation and Effect

This section must be construed, not as prescribing one indispensable method of procedure, and one only, but as pertaining to the two constitutional methods of procedure where an information is filed, neither one of which is indispensable, yet either of which is correct, as the conditions and facts of the case may warrant. *State v. Bowser*, 21 M 133, 136, 53 P 179.

The right of the attorney-general to be present before the grand jury is not affected by this section. *State ex rel. Nolan v. District Court*, 22 M 25, 31, 55 P 916.

Showing Necessary to Obtain Leave to File Information

The matter of obtaining leave to file an information, without a previous examination of the accused by a committing magistrate, is authorized by both constitution and statute; it is not to be considered as a merely perfunctory one, and though the county attorney is not required to support the application by affidavit or set forth therein the facts constituting the charge with technical accuracy, the showing must be sufficient to move the discretion of the court. In instant case, held motion must be complete in itself and not dependent on any former information which has become functus officio "as charged in the information as originally filed". *State ex rel. Juhl v. District Court*, 107 M 309, 316, 84 P 2d 979.

References

Cited or applied as section 205, Third Division Revised Statutes 1879, in *Territory v. Harding*, 6 M 323, 12 P 750; as section 206, Third Division Compiled Statutes 1887, in *State v. Smith*, 12 M 378, 30 P 679; as section 1910, Penal Code, in *State v. Calder*, 23 M 504, 506, 59 P 903; *State v. Schnepel*, 23 M 523, 528, 59 P 927; *State v. Peterson*, 24 M 81, 85, 60 P 809; *State v. Paine*, 61 M 270, 272, 202 P 203; *State v. Sorenson*, 65 M 65, 70, 210 P 752.

Indictment and Information—137 (1-7). 42 C.J.S. Indictments and Informations §§ 202-211, 213.

27 Am. Jur. 695, Indictments and Informations, §§ 138 et seq.

Court's power to amend indictment in matters of form. 7 ALR 1517.

Vacation or destruction of indictment as terminating liability of sureties on bail bond. 20 ALR 600.

Quashing indictment based on evidence illegally procured. 24 ALR 1432.

Privilege against self-incrimination before grand jury as affecting validity of indictment. 27 ALR 147.

Power of court to pass on competence, legality, or sufficiency of evidence on which indictment is based. 31 ALR 1479.

Motion to quash indictment as remedy for exclusion from grand jury of eligible class or classes of persons. 52 ALR 924.

Quashing indictment for lack or insufficiency of evidence before grand jury. 59 ALR 567.

Error in instructions by court to grand jury as ground for quashing indictment. 105 ALR 575.

Admissibility of testimony or affidavit of grand jurors for purpose of impeaching indictment. 110 ALR 1023.

Right of accused to attack indictment or information after reversal or setting aside of conviction. 145 ALR 493.

Certiorari after judgment to test sufficiency of indictment or information as regards the offense sought to be charged. 150 ALR 743.

94-6602. (11892) Defendant waives objections, unless he makes the motion. The motion to set aside the indictment or information must be in writing, subscribed by the defendant, or his attorney, and must specify clearly the ground of objection to the indictment or information, and such motion must be made before the defendant demurs or pleads, or the grounds of the objection are waived.

History: En. Sec. 207, p. 221, Cod. Stat. 1871; re-en. Sec. 207, 3d Div. Rev. Stat. 1879; re-en. Sec. 208, 3d Div. Comp. Stat. 1887; amd. Sec. 1911, Pen. C. 1895; re-en. Sec. 9194, Rev. C. 1907; re-en. Sec. 11892, R. C. M. 1921. Cal. Pen. C. Sec. 996.

Operation and Effect

If a defendant, on a second trial, does not ask to withdraw the plea of not guilty, interposed at the first trial, and have another and different plea substituted, it is a waiver of any grounds of objection to the information which might have been properly raised by motion to quash. *State v. McCaffery*, 16 M 33, 37, 40 P 63.

An omission to make a motion to set aside an information in the manner prescribed by this section on the ground that it had not been subscribed by the county attorney constitutes a waiver by the defendant of the objection to the action of the court in permitting the information to be subscribed before demurrer or plea. *State v. Peterson*, 24 M 81, 85, 60 P 809.

The defendant, in a criminal case, may insist that the provisions of sections 94-6204, 94-6206 and 94-6601 be observed, as they are all mandatory, but he need not do so. If he does not, the court is authorized and required by this section to proceed upon the assumption that all an-

tecedent requirements have been observed. *State v. Chevigny*, 48 M 382, 384, 138 P 257.

By entering his plea without a written motion to set aside the information, and consenting to go to trial, defendant waived his right to question the propriety of proceedings prior to the filing of the information. *State v. Vinn*, 50 M 27, 32, 144 P 773.

By his failure to object to the information charging him with a violation of the Prohibition Act, before demurrer or plea, on the ground that it was filed prior to a preliminary hearing, defendant waived his right to challenge the foundation of the information. *State v. Sorenson*, 65 M 65, 70. 210 P 752.

References

Cited or applied as section 208, Third Division Compiled Statutes 1887, in *State v. Smith*, 12 M 378, 30 P 679; as section 1911, Penal Code, in *State v. Schnepel*, 23 M 523, 528, 59 P 927.

Indictment and Information—138, 139.
42 C.J.S. Indictments and Informations §§ 197, 199, 200, 217.

27 Am. Jur. 731, Indictments and Informations, §§ 187, 188.

94-6603. (11893) Motion, when heard—if denied or granted, what proceedings are to be had. The motion must be heard at the time it is made, unless, for cause, the court postpones the hearing to another time. If the motion is denied, the defendant must immediately answer the indictment or information, either by demurring or pleading thereto. If the motion is granted, the court must order that the defendant, if in custody, be discharged therefrom, or, if admitted to bail, that his bail be exonerated, or, if he has deposited money instead of bail, that the same be refunded to him, unless it directs that the case be resubmitted to the same or another grand jury, or that another or amended information be filed by the county attorney.

History: Ap. p. Secs. 208, 209, p. 221, Cod. Stat. 1871; re-en. Secs. 208, 209, 3d Div. Rev. Stat. 1879; re-en. Secs. 209, 210, 3d Div. Comp. Stat. 1887; en. Sec. 1912, Pen. C. 1895; re-en. Sec. 9195, Rev. C. 1907; re-en. Sec. 11893, R. C. M. 1921. Cal. Pen. C. Sec. 997.

Indictment and Information ⇨ 140 (1), 141.

42 C.J.S. Indictments and Informations §§ 196, 214, 215, 216.

94-6604. (11894) Effect of order for resubmission. If the court directs the case to be resubmitted, or another or amended information be filed, the defendant, if already in custody, must so remain, unless he is admitted to bail; or, if already admitted to bail, or money has been deposited instead therefor, the bail or money is to be answerable for the appearance of the defendant to answer a new indictment or information; and, unless a new indictment is found by the same or another grand jury, or another or an amended information filed within thirty days from the date of the order, the court must make the order discharging the defendant, as prescribed by the preceding section.

History: Ap. p. Sec. 210, p. 222, Cod. Stat. 1871; re-en. Sec. 210, 3d Div. Rev. Stat. 1879; re-en. Sec. 211, 3d Div. Comp. Stat. 1887; en. Sec. 1913, Pen. C. 1895; re-en. Sec. 9196, Rev. C. 1907; re-en. Sec. 11894, R. C. M. 1921. Cal. Pen. C. Sec. 998.

Indictment and Information ⇨ 142.

42 C.J.S. Indictments and Informations §§ 215, 216.

94-6605. (11895) Order no bar to another prosecution. An order to set aside an indictment or information, as provided in this chapter, is no bar to a future prosecution for the same offense.

History: En. Sec. 1914, Pen. C. 1895; re-en. Sec. 9197, Rev. C. 1907; re-en. Sec. 11895, R. C. M. 1921. Cal. Pen. C. Sec. 999.

Criminal Law ⇨ 177.

22 C.J.S. Criminal Law § 252.

CHAPTER 67

DEMURRER

- Section 94-6701. Pleading on part of defendant.
 94-6702. Demurrer on plea, when put in.
 94-6703. Grounds of demurrer.
 94-6704. Demurrer, how put in and its form.
 94-6705. When heard.
 94-6706. Judgment on demurrer.
 94-6707. If allowed, bar to another prosecution, when.
 94-6708. If resubmission not ordered, defendant discharged, etc.
 94-6709. Proceedings, if resubmission ordered.
 94-6710. Proceedings, if demurrer is disallowed.
 94-6711. Objections, forming ground of demurrer, when taken.

94-6701. (11896) Pleading on part of defendant. The only pleading on the part of the defendant is either a demurrer or a plea.

History: En. Sec. 1920, Pen. C. 1895; re-en. Sec. 9198, Rev. C. 1907; re-en. Sec. 11896, R. C. M. 1921. Cal. Pen. C. Sec. 1002.

Criminal Law ⇨ 268; Indictment and Information ⇨ 146.

22 C.J.S. Criminal Law § 420; 42 C.J.S. Indictments and Informations § 219.

94-6702. (11897) Demurrer on plea, when put in. Both the demurrer and plea must be put in, in open court, either at the time of the arraignment or at such other time as may be allowed to the defendant for that purpose.

History: En. Sec. 1921, Pen. C. 1895; re-en. Sec. 9199, Rev. C. 1907; re-en. Sec. 11897, R. C. M. 1921. Cal. Pen. C. Sec. 1003.

Criminal Law 265; Indictment and Information 149.

22 C.J.S. Criminal Law § 410; 42 C.J.S. Indictments and Informations § 220.

94-6703. (11898) Grounds of demurrer. The defendant may demur to the indictment or information, when it appears upon the face thereof, either—

1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, by reason of its not being within the legal jurisdiction of the county; or, if an information, that the court has no jurisdiction of the offense charged therein;

2. That it does not substantially conform to the requirement of sections 94-6403, 94-6404 and 94-6405;

3. That more than one offense is charged;

4. That the facts stated do not constitute a public offense;

5. That it contains any matter, which if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution.

History: En. Sec. 211, p. 222, Cod. Stat. 1871; re-en. Sec. 211, 3d Div. Rev. Stat. 1879; amd. Sec. 1, p. 73, L. 1885; re-en. Sec. 212, 3d Div. Comp. Stat. 1887; amd. Sec. 1922, Pen. C. 1895; re-en. Sec. 9200, Rev. C. 1907; re-en. Sec. 11898, R. C. M. 1921. Cal. Pen. C. Sec. 1004.

Demurrer Because Uncertain and Indirect

If a charge of crime is not direct and certain, it is open to attack on special demurrer. *State v. Pemberton*, 39 M 530, 533, 104 P 556.

Demurrer on the Grounds that the Action is Barred by the Statute of Limitations

Where an information for a misdemeanor was filed more than one year and ten months after the time of the alleged offense, and it contains an allegation that, on or about that time, the defendant left the state and afterwards resided without the state, the defendant, under subdivision 5 of this section, may properly demur to the information on the ground that it appears upon the face thereof that the prosecution is barred by the statute of limitations. *State v. Clemens*, 40 M 567, 571, 107 P 896.

How to Object to Information on the Grounds of Duplicity

An objection to an information on the grounds of duplicity is addressed to the jurisdiction of the court rather than to the form of the information and may be raised by an objection to the introduction of evidence and a motion to compel on election. *State v. Mjelde*, 29 M 490, 75 P 87.

More Than One Offense

Where an information charges two offenses, the only method by which this fault can be taken advantage of is by demurrer interposed under subdivision 3 of this section. The failure to demur is a waiver of the objection. *State v. Mahoney*, 24 M 281, 285, 61 P 647. See also *State v. Rodgers*, 40 M 248, 251, 106 P 3.

Where defendant's objection that an information is bad, as charging more than one offense, under subdivision 3 of this section, is not taken in the trial court, it will not be considered for the first time on appeal. *State v. Mahoney*, 24 M 281, 285, 61 P 647.

The objection that several offenses are improperly united under separate counts in an information cannot be raised by a motion to require the prosecution to elect upon which one count it would rely for conviction, but must be taken by demurrer, *State v. Marchindo*, 65 M 431, 435, 211 P 1093.

Motion in Arrest of Judgment

A motion in arrest of judgment must be founded on some defect in the information mentioned in this section, and extrinsic evidence cannot be received on the hearing of such motion. *State v. Tully*, 31 M 365, 371, 78 P 760. See *State v. Van*, 44 M 374, 383, 120 P 479; *State v. Caterni*, 54 M 456, 458, 171 P 284.

A motion in arrest lies only for certain defects appearing on the face of the indictment or information, not waived by failure to demur. *State v. Caterni*, 54 M 456, 458, 171 P 284.

Waiver by Failure to Demur

By pleading to the information without interposing a demurrer that the facts

stated did not constitute a public offense, defendant waived objections to its sufficiency. *State v. Fowler*, 59 M 346, 352, 196 P 992.

The objection that the information states more than one offense can only be made by demurrer, and when not made before plea is waived. *State v. Toy*, 65 M 230, 233, 211 P 303.

When Only One Transaction Rule Applicable

The rule that there is but one larceny if several articles are stolen at different times and from different places under a single design, impulse or purpose, is applicable only if the different subjects involved are so related in point of time and location as to make it physically possible for actual control to be exercised over both at the same time. Held, that the taking of a bunch of horses a mile east of a ranch, and another bunch three quarters of a mile south, though corralled at the same place, but belonging to different persons, were independent offenses. *State v. Akers*, 106 M 105, 107, 109, 76 P 2d 638.

Where More Than One Offense Not Stated

In embezzlement of city water rentals, information alleging that employee did on

a certain day in 1931 "and from thence continuously" on divers dates to a given date two years later receive public funds aggregating a given amount which he failed to pay over to the city treasurer, held not open to objection of stating more than one offense nor being duplicitous, under the rule that in such case there is no duplicity where the embezzlement is accomplished by a continuous series of acts, which the state might treat as constituting one embezzlement, irrespective of ordinance requiring daily accounting. *State v. Kurth*, 105 M 260, 262, 72 P 2d 687.

References

Cited or applied as section 9200, Revised Codes, in *State v. Tudor*, 47 M 185, 131 P 632; *State v. Wehr*, 57 M 469, 475, 188 P 930; *In re Lockhart*, 72 M 136, 146, 232 P 183; *State v. Hanks*, 116 M 399, 406, 153 P 2d 220.

Indictment and Information \hookrightarrow 147.

42 C.J.S. Indictments and Informations § 222.

27 Am. Jur. 700, Indictments and Informations, §§ 144 et seq.

94-6704. (11899) Demurrer, how put in and its form. The demurrer must be in writing, signed either by the defendant or his counsel, and filed. It must distinctly specify the grounds of objection to the indictment or information, or it must be disregarded.

History: En. Sec. 212, p. 222, Cod. Stat. 1871; re-en. Sec. 212, 3d Div. Rev. Stat. 1879; re-en. Sec. 213, 3d Div. Comp. Stat. 1887; amd. Sec. 1923, Pen. C. 1895; re-en. Sec. 9201, Rev. C. 1907; re-en. Sec. 11899, R. C. M. 1921. Cal. Pen. C. Sec. 1005.

References

Cited or applied as section 9201, Revised Codes, in *State v. Tudor*, 47 M 185, 131 P 632.

Indictment and Information \hookrightarrow 148.

42 C.J.S. Indictments and Informations § 221.

94-6705. (11900) When heard. Upon the demurrer being filed, the argument upon the objections presented thereby must be heard, either immediately or at such time as the court may appoint.

History: En. Sec. 1924, Pen. C. 1895; re-en. Sec. 9202, Rev. C. 1907; re-en. Sec. 11900, R. C. M. 1921. Cal. Pen. C. Sec. 1006.

Indictment and Information \hookrightarrow 150.

42 C.J.S. Indictments and Informations § 223.

94-6706. (11901) Judgment on demurrer. Upon considering the demurrer, the court must give judgment, either allowing or disallowing it, and an order to that effect must be entered upon the minutes.

History: En. Sec. 1925, Pen. C. 1895; re-en. Sec. 9203, Rev. C. 1907; re-en. Sec. 11901, R. C. M. 1921. Cal. Pen. C. Sec. 1007.

must, among other things, contain the judgment roll in which must be included a copy of the judgment. The state, on the theory that an objection of defendant to the introduction of evidence on the ground of the insufficiency of the information is in effect a demurrer to the infor-

Operation and Effect

The record on appeal in a criminal case

mation and an order sustaining a demurrer constitutes the judgment, attempted to appeal from such an order as from the judgment, but the record did not contain a copy of the order in the form of a minute entry, which in such a case constitutes the judgment. Held, that the supreme court was without jurisdiction to entertain the appeal. *State v. Nilan et al.*, 75 M 397, 400, 243 P 1081.

Where the record in a criminal case on appeal by the state from a judgment sustaining a demurrer to the information contains the minute entry allowing the demurrer, the appeal is not subject to dismissal on the ground that the transcript does not contain a copy of the judgment, the order entered in the minutes constituting the judgment in such a case. *State v. Atlas*, 75 M 547, 549, 244 P 477.

Id. Defendant was charged with taking and using an automobile without the consent of the owner, under section 94-3305, which makes the offense punishable by fine or imprisonment in the county jail, or by imprisonment in the state penitentiary not exceeding five years. The information was not filed until fourteen months after the

commission of the offense. Held, that the district court erred in sustaining a demurrer to the pleading on the ground that, the offense being a misdemeanor, the limitation of one year fixed by section 94-5703, within which the information could be filed had expired, and holding that it was without jurisdiction to proceed.

Order Sustaining Demurrer to Information Constitutes Judgment

Under this section, an order sustaining a demurrer to an information constitutes a judgment. *State v. Safeway Stores, Inc.*, 106 M 182, 197, 76 P 2d 81.

References

Cited or applied as section 9203, Revised Codes, in *State v. Gemmell*, 45 M 210, 213, 122 P 268; *In re Palm*, 52 M 558, 160 P 348; *State v. Libby Yards*, 58 M 444, 193 P 394; *State ex rel. King v. District Court*, 95 M 400, 404, 26 P 2d 966; *State v. Thierfelder*, 114 M 104, 109, 132 P 2d 1035.

Indictment and Information—151.

42 C.J.S. Indictments and Informations § 224.

94-6707. (11902) If allowed, bar to another prosecution, when. If the demurrer is allowed, the judgment is final upon the indictment or information demurred to, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, or another or an amended information, directs the case to be submitted to another grand jury, or directs another or an amended information to be filed.

History: En. Sec. 1926, Pen. C. 1895; re-en. Sec. 9204, Rev. C. 1907; re-en. Sec. 11902, R. C. M. 1921. Cal. Pen. C. Sec. 1008.

Operation and Effect

After dismissal of an indictment because of substantial defects therein, the district court may, but is not required to, submit the case to another grand jury, or permit, or order, the county attorney to file an information charging the defendant with the same offense ineffectually sought to be charged against him by the indictment. *State v. Vinn*, 50 M 27, 33, 144 P 773.

This section is intended to safeguard the rights of the accused against an altogether unwarranted prosecution, or the possible malice of the prosecuting officer, but it is not intended to shield an offender against prosecution merely because of some technical defect, irregularity, or insufficiency in the original information or indictment. *State v. Vinn*, 50 M 27, 34, 144 P 773; *In re Palm*, 52 M 558, 560, 160 P 348.

Where an information was dismissed on the motion of the county attorney because of the omission of a material allegation therefrom, and a new information ordered filed by the court that before making the order it entertained the opinion that the objection to the original information could be avoided in the new one—an entry which might properly have been made but was not required to be made by this section—was not sufficient ground for the release of the complainant from custody on habeas corpus. *In re Palm*, 52 M 558, 160 P 348.

When Insufficiency Does Not Warrant Dismissal

Insufficiency of the information does not warrant a dismissal of the action if in the opinion of the court the objection may be avoided by an amended information. *State ex rel. Freebourn v. District Court*, 105 M 77, 81, 69 P 2d 748.

Criminal Law—177.

22 C.J.S. Criminal Law § 252.

94-6708. (11903) If resubmission not ordered, defendant discharged, etc. If the court does not permit the information to be amended, nor direct

that another information be filed, or that the case be resubmitted, as provided in the preceding section, the defendant, if in custody, must be discharged, or if admitted to bail, his bail is exonerated, or if he has deposited money instead of bail, the money must be refunded to him.

History: En. Sec. 1927, Pen. C. 1895; re-en. Sec. 9205, Rev. C. 1907; re-en. Sec. 11903, R. C. M. 1921. Cal. Pen. C. Sec. 1009. Indictment and Information 153. 42 C.J.S. Indictments and Informations § 226.

94-6709. (11904) Proceedings, if resubmission ordered. If the court directs that the case be resubmitted, or that another or an amended information be filed, the same proceedings must be had thereon as are prescribed in sections 94-6603 and 94-6604.

History: En. Sec. 1928, Pen. C. 1895; Sec. 9206, Rev. C. 1907; re-en. Sec. 11904, R. C. M. 1921. Cal. Pen. C. Sec. 1010. Indictment and Information 151. 42 C.J.S. Indictments and Informations § 224.

94-6710. (11905) Proceedings, if demurrer is disallowed. If the demurrer is disallowed, the defendant must plead forthwith, or at such time as the court may direct.

History: En. Sec. 215, p. 222, Cod. Stat. 1871; re-en. Sec. 215, 3d Div. Rev. Stat. 1879; re-en. Sec. 216, 3d Div. Comp. Stat. 1887; amd. Sec. 1929, Pen. C. 1895; re-en. Sec. 9207, Rev. C. 1907; re-en. Sec. 11905, R. C. M. 1921. Cal. Pen. C. Sec. 1011. Indictment and Information 152. 42 C.J.S. Indictments and Informations § 225.

94-6711. (11906) Objections, forming ground of demurrer, when taken. When the objections mentioned in section 94-6703 appear on the face of the indictment or information, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment or information, or that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, or after the trial, in arrest of judgment.

History: En. Sec. 216, p. 222, Cod. Stat. 1871; re-en. Sec. 216, 3d Div. Rev. Stat. 1879; re-en. Sec. 217, 3d Div. Comp. Stat. 1887; amd. Sec. 1930, Pen. C. 1895; re-en. Sec. 9208, Rev. C. 1907; re-en. Sec. 11906, R. C. M. 1921. Cal. Pen. C. Sec. 1012.

What is Waived by Motion in Arrest of Judgment

Where an information is attacked in the trial court by motion in arrest of judgment, all questions arising upon alleged defects in the information, except that of want of jurisdiction and the sufficiency of the facts to state a public offense, are waived. *State v. Pemberton*, 39 M 530, 533, 104 P 556; *State v. Fowler*, 59 M 346, 352, 196 P 992.

The objection that the information does not state facts constituting a public offense is not waived by failure to demur, but may be raised by motion in arrest of judgment. *State v. Wehr*, 57 M 469, 188 P 930.

The objection that the facts stated in an information do not constitute a public of-

fense may be taken either by demurrer or at the trial, under a plea of not guilty, or after the trial, in arrest of judgment. *State v. Smith*, 58 M 567, 570, 194 P 131.

When Failure to Demur Waives Objections

Defendant's failure to raise, by special demurrer, the question that an information charged two distinct offenses constituted a waiver of such objection. *State v. Mahoney*, 24 M 281, 285, 61 P 647; *State v. Rodgers*, 40 M 248, 251, 106 P 3.

Where an information charges two distinct offenses, the remedy is not by motion to compel the county attorney to elect, as between the two offenses charged, the one upon which he will seek conviction; the objection can only be taken by demurrer; and the objection, so far as any question of pleading is concerned, is waived by pleading over and failing to demur. *State v. Kanakaris*, 54 M 180, 182, 169 P 42.

The objection that the information states more than one offense can only be

made by demurrer, and when not made before plea is waived. *State v. Toy*, 65 M 230, 233, 211 P 303.

The objection that several offenses are improperly united under separate counts in an information cannot be raised by a motion to require the prosecution to elect upon which one count it would rely for conviction, but must be taken by demurrer. *State v. Marchindo*, 65 M 431, 435, 211 P 1093.

When Failure to Object by Motion Waives Objection

Where an accused person pleads to an information, without interposing the objection, by motion, that, having already been prosecuted by indictment, he cannot

be prosecuted by information, that objection is waived. *State v. Vinn*, 50 M 27, 33, 144 P 773.

References

Cited or applied as section 1930, Penal Code, *State v. Mjelde*, 29 M 490, 75 P 87; *State v. Gordon*, 35 M 458, 463, 90 P 173; as section 9208, Revised Codes, in *State v. Rodgers*, 40 M 248, 251, 106 P 3; *State v. Tudor*, 47 M 185, 131 P 632; *State v. Hanks*, 116 M 399, 406, 153 P 2d 220.

Criminal Law—105; Indictment and Information—133 (7).

22 C.J.S. Criminal Law §§ 154, 162-164; 42 C.J.S. Indictments and Informations §§ 193, 194, 332, 333.

CHAPTER 68

PLEAS

- Section 94-6801. The different kinds of pleas.
 94-6802. Plea, how put in and its form.
 94-6803. Plea of guilty, how put in and when withdrawn.
 94-6804. What plea of not guilty puts in issue.
 94-6805. What may be given in evidence under plea of not guilty.
 94-6806. What is not a former acquittal.
 94-6807. What is a former acquittal.
 94-6808. Conviction or acquittal for a higher offense, effect of.
 94-6809. Defendant refusing to answer, plea of not guilty.

✓ **94-6801. (11907) The different kinds of pleas.** There are four kinds of pleas to an indictment or information.

A plea of—

1. Guilty;
2. Not guilty;
3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty;
4. Once in jeopardy.

History: Ap. p. Sec. 217, p. 222, Cod. Stat. 1871; re-en. Sec. 217, 3d Div. Rev. Stat. 1879; re-en. Sec. 218, 3d Div. Comp. Stat. 1887; en. Sec. 1940, Pen. C. 1895; re-en. Sec. 9209, Rev. C. 1907; re-en. Sec. 11907, R. C. M. 1921. Cal. Pen. C. Sec. 1016.

Cross-Reference

Defendant's right to two day's time for preparation of trial after plea, sec. 94-7008.

Conditional Pleas not Authorized

Held, that since the Codes make no provision permitting one charged with a criminal offense to enter a conditional plea to the effect that he pleads guilty provided the punishment imposed be not greater than that designated, the court has no authority to receive such a plea and its entry is a nullity. *State v. Dow*, 71 M 291, 299, 229 P 402.

Not Applicable to Action for Wrongful Death Under Section 93-2810

The provisions of this section are not applicable in an action for death by wrongful act under section 93-2810, where a violation of the statute requiring the use of safety-cages in mines is charged. *Maronen v. Anaconda Copper Min. Co.*, 48 M 249, 261, 136 P 968.

Once in Jeopardy

The plea of "once in jeopardy" includes the plea of former conviction or acquittal and a judgment of conviction or acquittal. *State v. Keerl*, 33 M 501, 515, 85 P 862.

Id. In a criminal prosecution, there is only one jeopardy which continues in case of a discharge of the jury for disagreement, as also where a new trial is granted, from the beginning of the trial, after the swearing in of the first jury, until the particular case is finally determined.

Operation and Effect in General

Defendant was charged with liquor violations in four counts; he entered a plea of not guilty "to the offense charged." Two counts were dismissed and he was found guilty on the remaining two. Held, as against the contention that the conviction cannot be sustained because defendant never pleaded to the charges contained in the two counts on which conviction was had but had pleaded only to one offense, not ascertained, that his plea to the information as a whole was authorized by this section, and therefore sufficient. *State v. Grasswick*, 77 M 326, 328, 250 P 613.

When Motion to Change Plea to Not Guilty Properly Denied

Quaere: Is there a plea of "not guilty by reason of insanity" in view of this and the following section? Where defendant

pleaded guilty on two charges of murder, was sentenced to life imprisonment on each, and three years later filed motions for leave to withdraw his pleas of guilty and substitute pleas of not guilty by reason of insanity caused by alcoholism, held, under the facts and circumstances presented, that the motions were properly denied. *State v. Hukoveh*, 115 M 125, 131, 139 P 2d 538.

References

Cited or applied as section 1940, Penal Code, in *State v. Gordon*, 35 M 458, 464, 90 P 173; *State v. Thierfelder*, 114 M 104, 111, 132 P 2d 1035.

Criminal Law \Rightarrow 268.

22 C.J.S. Criminal Law § 420.

14 Am. Jur. 943, Criminal Law, §§ 257-291.

94-6802. (11908) Plea, how put in and its form. Every plea must be oral, and entered upon the minutes of the court in substantially the following form:

1. If the defendant plead guilty: "The defendant pleads that he is guilty of the offense charged."

2. If he plead not guilty: "The defendant pleads that he is not guilty of the offense charged."

3. If he plead a former conviction or acquittal: "The defendant pleads that he has already been convicted (or acquitted) of the offense charged by the judgment of the court of..... (naming it), rendered at..... (naming the place) on the..... day of....."

4. If he plead once in jeopardy: "The defendant pleads that he has been once in jeopardy for the offense charged (specifying the time, place, and court)."

History: Ap. p. Sec. 218, p. 222, Cod. Stat. 1871; re-en. Sec. 218, 3d Div. Rev. Stat. 1879; re-en. Sec. 219, 3d Div. Comp. Stat. 1887; en. Sec. 1941, Pen. C. 1895; re-en. Sec. 9210, Rev. C. 1907; re-en. Sec. 11908, R. C. M. 1921. Cal. Pen. C. Sec. 1017.

References

Cited or applied as section 1941, Penal Code, in *State v. Keerl*, 33 M 501, 514, 85

P 862; *State v. Dow*, 71 M 291, 299, 229 P 402; *State ex rel. Hurley v. District Court*, 76 M 222, 231, 246 P 250; *State v. Grasswick*, 77 M 326, 328, 250 P 613.

Criminal Law \Rightarrow 273, 292 (1), 300.

22 C.J.S. Criminal Law §§ 423, 424, 441, 451, 454.

94-6803. (11909) Plea of guilty, how put in and when withdrawn. A plea of guilty can be put in by the defendant himself only in open court, unless upon indictment or information against a corporation or for a misdemeanor, in which case it may be put in by counsel. The court may, at any time before judgment, upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted.

History: En. Sec. 1942, Pen. C. 1895; re-en. Sec. 9211, Rev. C. 1907; re-en. Sec. 11909, R. C. M. 1921. Cal. Pen. C. Sec. 1018.

Circumstances Under Which Motion to Change Plea Granted

Defendant, a Mexican without education and unfamiliar with court procedure, stood

charged with murder in the first degree. When he asked for a jury trial his first attorney asked to be relieved of his assignment; the second advised defendant to plead guilty and take a life sentence, whereas if he were tried by jury the sentence would be one of death. Defendant's plea was guilty, and the court imposed the death sentence. Held, that trial court abused its discretion in refusing to grant defendant's motion for permission to change his plea to one of not guilty. *State v. Casaras*, 104 M 404, 413, 66 P 2d 774.

In Cases of Doubt That Plea Voluntary, Application to Change Plea Should be Granted

On hearing of an application of defendant, accused of crime, for permission to change his plea of guilty to not guilty, any doubt that the first plea was not voluntary should be resolved in his favor and in favor of a trial on the merits; plea should be entirely voluntary by one competent to know the consequences and should not be induced by fear, persuasion, prom-

ise or ignorance. *State v. Casaras*, 104 M 404, 413, 66 P 2d 774.

When Plea of Guilty may be Withdrawn After Judgment

Held that while this section provides that the district court at any time before judgment may permit a plea of guilty to be withdrawn and a plea of not guilty to be substituted, the court is not prohibited by statute from permitting this to be done after judgment; that the power to permit the latter is inherent and may be exercised in the court's discretion to rectify an injustice, especially where occasioned through ignorance or lack of understanding of the gravity of the offense charged against the petitioner and its discretion in that behalf may not be disturbed on appeal except on a showing of abuse thereof. *State ex rel. Foot v. District Court et al.*, 81 M 495, 501, 263 P 979.

Criminal Law⊕273, 274.

22 C.J.S. Criminal Law §§ 421, 423, 424.

14 Am. Jur., Criminal Law, p. 950, §§ 269-272; p. 960, §§ 286-288.

94-6804. (11910) What plea of not guilty puts in issue. The plea of not guilty puts in issue every material allegation of the indictment or information.

History: En. Sec. 221, p. 223, Cod. Stat. 1871; re-en. Sec. 221, 3d Div. Rev. Stat. 1879; re-en. Sec. 222, 3d Div. Comp. Stat. 1887; amd. Sec. 1943, Pen. C. 1895; re-en. Sec. 9212, Rev. C. 1907; re-en. Sec. 11910, R. C. M. 1921. Cal. Pen. C. Sec. 1019.

Operation and Effect

The plea of not guilty of the offense charged in the information puts in issue allegations of prior convictions, as well as

the other allegations therein contained, and there is no merit in the contention that defendant, never having pleaded to the charge of prior convictions, no issue was raised as to that allegation. *State v. Gordon*, 35 M 458, 464, 90 P 173.

Criminal Law⊕300.

22 C.J.S. Criminal Law §§ 451-454.

14 Am. Jur. 949, Criminal Law, § 268.

94-6805. (11911) What may be given in evidence under plea of not guilty. All matters of fact tending to establish a defense other than that specified in the third and fourth subdivisions of section 94-6801, may be given in evidence under the plea of not guilty.

History: En. Sec. 1944, Pen. C. 1895; re-en. Sec. 9213, Rev. C. 1907; re-en. Sec. 11911, R. C. M. 1921. Cal. Pen. C. Sec. 1020.

Indictment and Information⊕169.

42 C.J.S. Indictments and Informations § 253.

94-6806. (11912) What is not a former acquittal. If the defendant was formerly acquitted on the ground of variance between the indictment or information and the proof, or the indictment or information was dismissed upon an objection to its form or substance, or in order to hold the defendant for a higher offense, without a judgment of acquittal, it is not an acquittal of the same offense.

History: En. Sec. 222, p. 223, Cod. Stat. 1871; re-en. Sec. 222, 3d Div. Rev. Stat. 1879; re-en. Sec. 223, 3d Div. Comp. Stat. 1887; amd. Sec. 1945, Pen. C. 1895; re-en. Sec. 9214, Rev. C. 1907; re-en. Sec. 11912, R. C. M. 1921. Cal. Pen. C. Sec. 1021.

References

Cited or applied as section 223, Third Division Compiled Statutes 1887, in *State v. Sullivan*, 9 M 490, 24 P 23.

Criminal Law—186.

22 C.J.S. Criminal Law §§ 264-266, 268, 476.

14 Am. Jur. 955, Criminal Law, §§ 277-285.

Plea of former jeopardy or of former conviction or acquittal where jury was not sworn. 12 ALR 1006.

Plea of double jeopardy where jury was discharged because of inability of prosecution to present testimony. 74 ALR 803.

94-6807. (11913) What is a former acquittal. Whenever the defendant is acquitted on the merits, he is acquitted of the same offense, notwithstanding any defects in form or substance in the indictment or information on which the trial was had.

History: En. Sec. 223, p. 223, Cod. Stat. 1871; re-en. Sec. 223, 3d Div. Rev. Stat. 1879; re-en. Sec. 224, 3d Div. Comp. Stat. 1887; amd. Sec. 1946, Pen. C. 1895; re-en. Sec. 9215, Rev. C. 1907; re-en. Sec. 11913, R. C. M. 1921. Cal. Pen. C. Sec. 1022.

Conviction or acquittal of robbery as bar to subsequent prosecution for murder done in the perpetration of the robbery. 4 ALR 702.

Conviction or acquittal of larceny as bar to prosecution for burglary. 19 ALR 626.

Conviction or acquittal upon charge of murder of one person as bar to prosecution for like offense against another person at the same time. 20 ALR 341.

Conviction or acquittal in one district as bar to prosecution in another, based on continuous transportation of intoxicating liquor. 24 ALR 1125.

Acquittal as bar to a prosecution of accused for perjury committed at trial. 37 ALR 1290.

Acquittal or conviction of assault and battery as bar to prosecution for rape, or assault with intent to commit rape, based on same transactions. 78 ALR 1213.

Conviction or acquittal under charge of assault with intent to rob as bar to prosecution for assault with intent to kill based on same transaction or on closely connected transactions. 81 ALR 701.

Conviction or acquittal on charge which includes element of illicit sexual intercourse as bar to prosecution for adultery. 94 ALR 405.

Conviction or acquittal on charge of assault on one person as bar to prosecution for assault against another person at the same time. 113 ALR 222.

Double jeopardy where jury is discharged before termination of trial because of illness of accused. 159 ALR 750.

94-6808. (11914) Conviction or acquittal for a higher offense, effect of. When the defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment or information, the conviction, acquittal, or jeopardy is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information.

History: En. Sec. 224, p. 223, Cod. Stat. 1871; re-en. Sec. 224, 3d Div. Rev. Stat. 1879; re-en. Sec. 225, 3d Div. Comp. Stat. 1887; amd. Sec. 1947, Pen. C. 1895; re-en. Sec. 9216, Rev. C. 1907; re-en. Sec. 11914, R. C. M. 1921. Cal. Pen. C. Sec. 1023.

Operation and Effect

Where an information charging rape was dismissed after commencement of trial but before verdict, and a new one filed fixing the time of the commission of the crime fifty days later, the defense of once in jeopardy was not available, since the offense charged in the second information was neither the same but a new and independent one, not one "necessarily in-

cluded" in the first charge, within the meaning of this section. *State v. Gaimos*, 53 M 118, 122, 162 P 596.

Id. The words "offense necessarily included," used in this section, mean a lower degree of the crime charged, or a minor offense of the same character, predicated on the same act or acts.

References

Cited or applied as section 1947, Penal Code, in *State v. Keerl*, 33 M 501, 514, 85 P 862.

Criminal Law—165, 186, 187.

22 C.J.S. Criminal Law §§ 243, 264-266, 268, 269, 270, 276, 476.

94-6809. (11915) Defendant refusing to answer, plea of not guilty. If the defendant refuse to answer the indictment or information by demurrer or plea, a plea of not guilty must be entered.

History: En. Sec. 135, p. 237, Bannack Stat.; re-en. Sec. 198, p. 220, Cod. Stat. 1871; re-en. Sec. 198, 3d Div. Rev. Stat. 1879; re-en. Sec. 199, 3d Div. Comp. Stat. 1887; amd. Sec. 1948, Pen. C. 1895; re-en. Sec. 9217, Rev. C. 1907; re-en. Sec. 11915, R. C. M. 1921. Cal. Pen. C. Sec. 1024.

Operation and Effect

Where the record discloses that the defendant refused to plead to any charge contained in the indictment, this section is sufficiently complied with by the action of the court in ordering a plea of "not guilty

to all charges contained in the indictment." State v. Clancy, 20 M 498, 502, 52 P 267.

Where time for entering plea arrived, the requiring of defendant to plead to information, even though in absence of counsel, was not error and where defendant stood mute court properly entered a plea of not guilty for him. State v. Stevens, ___ M ___, 172 P 2d 299, 301.

Criminal Law 300.

22 C.J.S. Criminal Law § 450 et seq.

CHAPTER 69

CHANGE OF PLACE OF TRIAL

Section	94-6901.	What petition to contain.
	94-6902.	Petition, how supported.
	94-6903.	Application, when made.
	94-6904.	Order of court or judge.
	94-6905.	Application on part of state.
	94-6906.	When change of place of trial not granted.
	94-6907.	Order of removal, how entered.
	94-6908.	Custody of defendant.
	94-6909.	Trial.
	94-6910.	Order as to witnesses.
	94-6911.	Failure of duty by clerk.
	94-6912.	Change of place of trial as to other defendants.

94-6901. (11916) What petition to contain. A defendant in an indictment or information may be awarded a change of place of trial upon his petition, on oath (or upon the oath of some credible person), setting forth that he has reason to believe that he will not receive a fair trial in the court in which such indictment or information may be pending, which petition shall state the facts upon which the same is based, for—

1. That the judge is interested or prejudiced; or,
2. Is of kin to or has been counsel for either party; or,
3. That the prosecuting witness or the county attorney has an undue influence over the minds of the people of the county where the indictment or information is pending; or,
4. That the people of the county are so prejudiced against the defendant that he cannot have a fair trial; or,
5. That it is impossible to obtain a jury in the county that has not formed an opinion, as to the guilt or innocence of the defendant, such as would disqualify them as jurors.

History: Ap. p. Sec. 145, p. 238, Bannack Stat.; re-en. Sec. 225, p. 223, Cod. Stat. 1871; re-en. Sec. 225, 3d Div. Rev. Stat. 1879; re-en. Sec. 226, 3d Div. Comp. Stat. 1887; en. Sec. 1970, Pen. C. 1895; re-en. Sec. 9219, Rev. C. 1907; re-en. Sec. 11916, R. C. M. 1921. Cal. Pen. C. Sec. 1033.

Operation and Effect

In the expression "place of trial," the word "place" primarily means county, and

not the immediate place where the trial court sits. In this connection it is equivalent to neighborhood or place of a crime, or a cause of action, or the political division within which a jury must be gathered for the trial, and is synonymous with the word "venue." State ex rel. Sackett v. Thomas, 25 M 226, 237, 64 P 503.

References

Cited or applied as section 1970, Penal Code, in State ex rel. B. & M. Co. v.

Judges, 30 M 193, 198, 76 P 10; State v. District Court, 61 M 558, 573, 202 P 756.

Criminal Law⌚124-127.

22 C.J.S. Criminal Law §§ 194-197.

14 Am. Jur. 929, Criminal Law, §§ 232 et seq.; 56 Am. Jur. 47, Venue, § 42 et seq.

Interlocutory order of one judge concerning change of venue as binding on another judge in same case. 132 ALR 72.

94-6902. (11917) Petition, how supported. The petition may be supported either by affidavits or oral testimony.

History: En. Sec. 1971, Pen. C. 1895; re-en. Sec. 9220, Rev. C. 1907; re-en. Sec. 11917, R. C. M. 1921. Cal. Pen. C. Sec. 1034.

Criminal Law⌚134 (1, 2).

22 C.J.S. Criminal Law §§ 206, 209.

94-6903. (11918) Application, when made. A defendant may apply to the court or to a judge in vacation for a change of place of trial, upon reasonable notice to the county attorney.

History: En. Sec. 1972, Pen. C. 1895; re-en. Sec. 9221, Rev. C. 1907; re-en. Sec. 11918, R. C. M. 1921. Cal. Pen. C. Sec. 1034.

Criminal Law⌚130-133.

22 C.J.S. Criminal Law §§ 199, 201-203. 56 Am. Jur. 61, Venue, § 60 et seq.

94-6904. (11919) Order of court or judge. The court or judge, being satisfied that good cause exists therefor, may award a change of place of trial to some county where the causes complained of do not exist. But there shall be but one change of place of trial.

History: En. Sec. 1973, Pen. C. 1895; re-en. Sec. 9222, Rev. C. 1907; re-en. Sec. 11919, R. C. M. 1921. Cal. Pen. C. Sec. 1035.

Criminal Law⌚139.

22 C.J.S. Criminal Law § 213.

94-6905. (11920) Application on part of state. The state may have a change of place of trial for any of the causes for which the defendant may obtain the same. The petition therefor must be made by the county attorney, or attorney prosecuting, to the court or judge, supported by affidavits or oral testimony.

History: Ap. p. Secs. 227, 228, p. 224, Cod. Stat. 1871; re-en. Secs. 227, 228, 3d Div. Rev. Stat. 1879; re-en. Secs. 228, 229, 3d Div. Comp. Stat. 1887; en. Sec. 1974,

Pen. C. 1895; re-en. Sec. 9223, Rev. C. 1907; re-en. Sec. 11920, R. C. M. 1921.

Criminal Law⌚117.

22 C.J.S. Criminal Law § 188.

94-6906. (11921) When change of place of trial not granted. Change of place of trial must not be granted after the first term or session at which the party applying for the same might have been heard, unless the cause shall have arisen subsequent to such term or session. If one or more trials be had, and a new trial is necessary, either by reason of the discharge of a jury without a verdict, or of the granting of a new trial, the removal may be allowed at any time before the new trial.

History: Ap. p. Sec. 229, p. 224, Cod. Stat. 1871; re-en. Sec. 229, 3d Div. Rev. Stat. 1879; re-en. Sec. 230, 3d Div. Comp. Stat. 1887; en. Sec. 1975, Pen. C. 1895;

re-en. Sec. 9224, Rev. C. 1907; re-en. Sec. 11921, R. C. M. 1921.

Criminal Law⌚132.

22 C.J.S. Criminal Law § 202.

94-6907. (11922) Order of removal, how entered. The order of removal, whether made by the court or judge, must be entered upon the minutes, and the clerk must immediately make out and transmit to the court to which the action is removed, a certified copy of the order of removal, and of the

record, pleadings and proceedings in the action, including the undertaking for the appearance of the defendant and of the witnesses.

History: En. Sec. 1976, Pen. C. 1895; re-en. Sec. 9225, Rev. C. 1907; re-en. Sec. 11922, R. C. M. 1921. Cal. Pen. C. Sec. 1036.

Criminal Law 140, 141.
22 C.J.S. Criminal Law §§ 214, 216.

94-6908. (11923) Custody of defendant. If the defendant is in custody, the order must direct his removal, and he must be forthwith removed by the sheriff of the county where he is imprisoned to the custody of the sheriff of the county to which the action is removed.

History: Ap. p. Sec. 146, p. 239, Bannack Stat.; re-en. Sec. 226, p. 224, Cod. Stat. 1871; re-en. Sec. 226, 3d Div. Rev. Stat. 1879; re-en. Sec. 227, 3d Div. Comp.

Stat. 1887; en. Sec. 1977, Pen. C. 1895; re-en. Sec. 9226, Rev. C. 1907; re-en. Sec. 11923, R. C. M. 1921. Cal. Pen. C. Sec. 1037.

94-6909. (11924) Trial. The court to which the action is removed must proceed to trial and judgment therein as if the action had been commenced in such court. If it is necessary to have any of the original pleadings or other papers before such court, the court from which the action is removed must at any time, upon application of the county attorney or of the defendant, order such papers or pleadings to be transmitted by the clerk, a certified copy thereof being retained.

History: En. Sec. 1978, Pen. C. 1895; re-en. Sec. 9227, Rev. C. 1907; re-en. Sec. 11924, R. C. M. 1921. Cal. Pen. C. Sec. 1038.

Criminal Law 142.
22 C.J.S. Criminal Law § 217.
56 Am. Jur. 66, Venue, §§ 66 et seq.

94-6910. (11925) Order as to witnesses. If the order of removal is made at a term or session of the court it is notice to every person who has entered into an undertaking to appear at such term or session. In other cases the witnesses must be subpoenaed as provided in this code.

History: En. Sec. 151, p. 240, Bannack Stat.; re-en. Sec. 233, p. 225, Cod. Stat. 1871; re-en. Sec. 233, 3d Div. Rev. Stat. 1879; re-en. Sec. 234, 3d Div. Comp. Stat.

1887; amd. Sec. 1979, Pen. C. 1895; re-en. Sec. 9228, Rev. C. 1907; re-en. Sec. 11925, R. C. M. 1921.

94-6911. (11926) Failure of duty by clerk. If the clerk of the district court neglects or refuses to perform any duty in relation to the removal of a cause, he forfeits a sum not exceeding five hundred dollars, to be recovered by an action in the name of and for the use of the state or the person injured.

History: En. Sec. 152, p. 240, Bannack Stat.; re-en. Sec. 234, p. 225, Cod. Stat. 1871; re-en. Sec. 234, 3d Div. Rev. Stat. 1879; re-en. Sec. 235, 3d Div. Comp. Stat. 1887; amd. Sec. 1980, Pen. C. 1895; re-en.

Sec. 9229, Rev. C. 1907; re-en. Sec. 11926, R. C. M. 1921.

Clerks of Courts 67.
14 C.J.S. Clerks of Courts § 38.

94-6912. (11927) Change of place of trial as to other defendants. If there are several defendants in an indictment or information, and the place of trial is changed as to one or more of them, and not as to the others, the others must be tried as if the place of trial had not been changed as to any defendant.

History: En. Sec. 153, p. 240, Bannack Stat.; re-en. Sec. 235, p. 225, Cod. Stat. 1871; re-en. Sec. 235, 3d Div. Rev. Stat. 1879; re-en. Sec. 236, 3d Div. Comp. Stat.

1887; amd. Sec. 1981, Pen. C. 1895; re-en. Sec. 9230, Rev. C. 1907; re-en. Sec. 11927, R. C. M. 1921.

References

Cited or applied as section 1981, Penal Code, in *State ex rel. B. & M. Co. v. Judges*, 30 M 193, 198, 76 P 10.

Criminal Law \S 120.

22 C.J.S. Criminal Law $\S\S$ 189, 190.

CHAPTER 70**MODE OF TRIAL—FORMATION OF JURY AND CALENDAR OF ISSUES
—POSTPONEMENT OF TRIAL**

- Section 94-7001. Issue of fact defined.
 94-7002. How tried.
 94-7003. Information or indictment against a judge.
 94-7004. When presence of defendant is necessary on the trial.
 94-7005. Formation of trial jury.
 94-7006. Clerk to prepare a calendar.
 94-7007. Order of disposing of issues on the calendar.
 94-7008. Defendant entitled to two days to prepare for trial.
 94-7009. Notice and affidavits for postponement.
 94-7010. Postponement for cause.
 94-7011. State may have continuance.
 94-7012. Effect of failure to apply.
 94-7013. Case set for trial.

94-7001. (11928) Issue of fact defined. An issue of fact arises—

1. Upon a plea of not guilty;
2. Upon a plea of a former conviction or acquittal of the same offense;
3. Upon a plea of once in jeopardy.

History: En. Sec. 1990, Pen. C. 1895; re-en. Sec. 9231, Rev. C. 1907; re-en. Sec. 11928, R. C. M. 1921. Cal. Pen. C. Sec. 1041.

Operation and Effect

The pleas of former acquittal and once in jeopardy involve an issue of fact, and cannot be determined without a finding by a jury. *State v. O'Brien*, 19 M 6, 47 P 103.

Test for Determination of Former Jeopardy

The test to be applied in determining whether, in a criminal prosecution, the plea of former jeopardy should be sustained is whether the matter set out in the second information was admissible as evidence and would have sustained a conviction under the first information. Held, that a second information filed charging defendant with embezzlement of city funds, dismissed, and that it was error to refuse to entertain defendant's plea. *State v. Parmenter*, 112 M 312, 315, 116 P 2d 879.

When Plea of Once in Jeopardy Properly Denied

In a prosecution for the larceny of one of four colts, all stolen at the same time and place, defendant was convicted and served about a month in the state prison when a new trial was granted him for want of proper proof of ownership of the colt. Thereupon a new information was

filed charging the theft of one of the other three colts, and defendant interposed a plea of once in jeopardy, which was properly denied, not because of a different offense, theft of four colts at the same time constituting but one offense, but because in the granting of a new trial he is in the same jeopardy. *State v. Aus*, 105 M 82, 86, 69 P 2d 584.

Id. One who procures a judgment of conviction against him to be set aside may be tried anew on the same or another information for the same offense of which he was convicted.

Id. Where one convicted of crime is granted a new trial he is not placed in new jeopardy by the second trial, but is in the same jeopardy he was in when the first trial was had.

Id. The mere pendency of a prior information does not sustain the plea of former jeopardy; where there are two informations pending charging the same offense, until there has been a trial or defendant is placed in jeopardy under one information, the plea of former jeopardy is not available as against the other.

When Only One Transaction Rule Applicable

The rule that there is but one larceny if several articles are stolen at different times and from different places under a single design, impulse or purpose, is applicable only if the different subjects involved are so related in point of time and location as to make it physically possible for

actual control to be exercised over both at the same time. Held, that the taking of a bunch of horses a mile east of a ranch, and another bunch three quarters of a mile south, though corralled at the same place, but belonging to different persons, were independent offenses. *State v. Akers*, 106 M 105, 107, 109, 76 P 2d 638.

94-7002. (11929) How tried. Issue of fact must be tried by jury, unless a trial by jury be waived in criminal cases not amounting to felony, by the consent of both parties expressed in open court and entered in its minutes. In cases of misdemeanor the jury may consist of twelve, or any number less than twelve upon which the parties may agree in open court. In cases not amounting to a felony two-thirds in number of the jury may render a verdict.

History: En. Sec. 1991, Pen. C. 1895; re-en. Sec. 9232, Rev. C. 1907; re-en. Sec. 11929, R. C. M. 1921. Cal. Pen. C. Sec. 1042.

References

Cited or applied as section 9232, Revised

References

Cited or applied as section 1990, Penal Code, in *State v. Keerl*, 33 M 501, 514, 85 P 862.

Criminal Law 737 (1).

23 C.J.S. Criminal Law §§ 1118, 1120, 1122, 1136, 1142.

Codes, in *State v. Hall*, 55 M 182, 187, 175 P 267.

Criminal Law 737 (1), 872½; Jury 4.

23 C.J.S. Criminal Law §§ 1118, 1120, 1122, 1136, 1142, 1391; 50 C.J.S. Juries § 7.

94-7003. (11930) Information or indictment against a judge. When an indictment is found, or an information filed in a district court against a judge thereof, a certificate of that fact must be transmitted by the clerk to the governor, who shall thereupon designate and direct a judge of the district court of another district to preside at the trial of such indictment or information, and hear and determine all pleas and motions affecting the defendant thereunder before and after judgment.

History: En. Sec. 1960, Pen. C. 1895; re-en. Sec. 9218, Rev. C. 1907; re-en. Sec. 11930, R. C. M. 1921. Cal. Pen. C. Sec. 1029.

Judges 15 (1).

48 C.J.S. Judges § 101.

94-7004. (11931) When presence of defendant is necessary on the trial. The defendant must be personally present at the trial; but if for misdemeanor, the trial may be had in the absence of the defendant; if his presence is necessary for any purpose, the court may, upon application of the county attorney, by an order or warrant, require the personal attendance of the defendant at the trial.

History: En. Sec. 165, p. 242, Bannack Stat.; re-en. Sec. 291, p. 235, Cod. Stat. 1871; re-en. Sec. 291, 3d Div. Rev. Stat. 1879; re-en. Sec. 292, 3d Div. Comp. Stat. 1887; amd. Sec. 1992, Pen. C. 1895; re-en. Sec. 9233, Rev. C. 1907; re-en. Sec. 11931, R. C. M. 1921. Cal. Pen. C. Sec. 1043.

Id. Minutes of the trial court in a capital case examined and held not to show even by reasonable inference that defendant or his counsel was present during the trial of the cause, in disregard of the statutory provisions entitling defendant to a reversal of the judgment.

Must Appear from Record

Under the constitutional and statutory provisions applicable, a defendant charged with crime must be present throughout the entire trial, including the rendition of the verdict, and the fact of his presence must be made to appear from the record. *State v. Reed*, 65 M 51, 55, 56, 210 P 756.

Right Cannot be Waived

One charged with crime cannot waive his right to be present at his trial. *State v. Reed*, 65 M 51, 55, 56, 210 P 756.

What Is not Considered Part of the Trial

The settlement of instructions being no part of the "trial," within the meaning of this section, the absence of one charged

with felony during such settlement does not constitute reversible error. *State v. Hall*, 55 M 182, 187, 175 P 267.

This section requires the personal presence of the defendant at the trial in felony cases. After the jury had retired to the jury-room for deliberation of their verdict they requested that certain exhibits consisting of a gun, a pair of shoes and other articles found in defendant's room, be sent to them. While defendant was not present in the courtroom, his counsel gave his consent. Held, that the proceeding did not constitute a part of the trial and therefore defendant's presence was not required, and that defendant's

counsel having given his consent, the court did not abuse its discretion in complying with the jury's request, even though the exhibits were not of the nature of those authorized by section 94-7303, to be taken to the jury-room. *State v. Olson*, 87 M 389, 395, 287 P 938.

Criminal Law⚡636 (1).

23 C.J.S. Criminal Law § 973.

14 Am. Jur. 898, Criminal Law, §§ 189 et seq.

Personal presence of defendant and his counsel as necessary to the validity of discharge of jury in criminal case before reaching verdict. 150 ALR 764.

94-7005. (11932) Formation of trial jury. Trial juries for criminal actions are formed in the same manner as trial juries in civil actions.

History: Ap. p. Sec. 166, p. 243, *Bannack Stat.*; amd. Sec. 282, p. 234, *Cod. Stat.* 1871; re-en. Sec. 282, 3d Div. *Rev. Stat.* 1879; re-en. Sec. 283, 3d Div. *Comp. Stat.* 1887; re-en. Sec. 2000, *Pen. C.* 1895; re-en. Sec. 9234, *Rev. C.* 1907; re-en. Sec. 11932, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 1046.

Operation and Effect

A jury panel in a criminal case must be drawn in substantial conformity with the

requirements of the Code relating to trial juries in civil actions, and those requirements in their essential particulars are mandatory. *State v. Landry*, 29 M 218, 223, 74 P 418.

References

State v. Showen, 60 M 474, 478, 199 P 917.

Jury⚡57.

50 C.J.S. Juries § 50.

94-7006. (11933) Clerk to prepare a calendar. The clerk must keep a calendar of all criminal actions pending in the court, enumerating them according to the date of the filing of the indictment or information, specifying opposite the title of each action whether it is for a felony or a misdemeanor, and whether the defendant is in custody or on bail.

History: En. Sec. 2001, *Pen. C.* 1895; re-en. Sec. 9235, *Rev. C.* 1907; re-en. Sec. 11933, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 1047.

Operation and Effect

This section requiring the clerk of the district court to keep a calendar of criminal actions enumerated according to the date of filing the information; section 94-7007, declaring that the calendar must be disposed of in the order therein named unless the court shall direct other-

wise, and section 94-7013, providing that if a case is not postponed it must be set for hearing in the order in which it appears on the calendar, unless by consent it is set down for trial out of its order, are directory only, the district court having power to control its docket and the order in which it may try cases. *State v. Quinlan*, 84 M 364, 369, 275 P 750.

Criminal Law⚡632.

23 C.J.S. Criminal Law § 929.

94-7007. (11934) Order of disposing of issues on the calendar. The issues on the calendar must be disposed of in the following order, unless for good cause the court shall direct an action to be tried out of its order:

1. Prosecutions for felony, when the defendant is in custody.
2. Prosecutions for misdemeanor, when the defendant is in custody.
3. Prosecutions for felony, when the defendant is on bail.
4. Prosecutions for misdemeanor, when the defendant is on bail.

History: En. Sec. 2002, *Pen. C.* 1895; re-en. Sec. 9236, *Rev. C.* 1907; re-en. Sec. 11934, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 1048.

Operation and Effect

Section 94-7006, requiring the clerk of the district court to keep a calendar of criminal actions enumerated according

to the date of filing the information; this section, declaring that the calendar must be disposed of in the order therein named unless the court shall direct otherwise, and section 94-7013, providing that if a case is not postponed it must be set for hearing in the order in which it

appears on the calendar, unless by consent it is set down for trial out of its order, are directory only, the district court having power to control its docket and the order in which it may try cases. *State v. Quinlan*, 84 M 364, 369, 275 P 750.

94-7008. (11935) Defendant entitled to two days to prepare for trial. After his plea, the defendant is entitled to at least two days to prepare for trial.

History: En. Sec. 274, p. 233, Cod. Stat. 1871; re-en. Sec. 274, 3d Div. Rev. Stat. 1879; re-en. Sec. 275, 3d Div. Comp. Stat. 1887; amd. Sec. 2003, Pen. C. 1895; re-en. Sec. 9237, Rev. C. 1907; re-en. Sec. 11935, R. C. M. 1921. Cal. Pen. C. Sec. 1049.

Nonprejudice on Unnecessary Amendment and Rearraignment Under Notice

Where original information on attempt to commit arson sufficient, to which defendant pleaded not guilty, but county attorney, after giving defendant ten days' notice of proposed amendment was permitted on day of trial to amend showing manner and means of the attempt, whereupon defendant was unnecessarily rearraigned, the fact that he was not given two days in which to prepare trial after rearraignment under this section could not

have affected him prejudicially, in view of notice and unnecessary amendment. *State v. Gaffney*, 106 M 310, 312, 77 P 2d 398.

Operation and Effect

Under this section the defendant is entitled to at least two days to prepare for trial; therefore where he had seven months from the day of entry of his plea to the day of trial for preparation, he had no cause for complaint in this regard. *State v. Showen*, 60 M 474, 478, 199 P 917.

References

State v. Kocher, 112 M 511, 518, 119 P 2d 35.

Criminal Law—577.

22 C.J.S. Criminal Law § 479.

94-7009. (11936) Notice and affidavits for postponement. At the time the defendant makes his plea to an indictment or information he must notify the court of his desire for a postponement of the trial to some particular day, or for the term, and must file his affidavit, showing good cause therefor, within such time as the court may grant.

History: En. Sec. 269, p. 232, Cod. Stat. 1871; re-en. Sec. 269, 3d Div. Rev. Stat. 1879; re-en. Sec. 270, 3d Div. Comp. Stat. 1887; re-en. Sec. 2010, Pen. C. 1895; re-en. Sec. 9238, Rev. C. 1907; re-en. Sec. 11936, R. C. M. 1921. Cal. Pen. C. Sec. 1052.

Operation and Effect

An affidavit, filed on the day set for trial, in support of a motion for a continuance on the ground of the absence of witnesses, which fails to disclose the date upon which such witnesses left the state, is insufficient. *State v. Showen*, 60 M 474, 476, 199 P 917.

Id. An affidavit of the character of the above must disclose specifically the facts

expected to be proved by the absent witnesses, and set forth that if such witnesses were present they would testify to those facts; the general statement that, if present, they would testify to facts material to affiant's defense being insufficient.

Id. An affidavit of the nature above, must also disclose that the facts which defendant expects to prove by the absent witnesses cannot be proved by other witnesses available at the trial; since a continuance for the purpose of obtaining evidence which would be merely cumulative need not be granted.

Criminal Law—605, 608.

22 C.J.S. Criminal Law §§ 509, 517, 520.

94-7010. (11937) Postponement for cause. For good cause shown the court may postpone the trial for any number of days or for the term. Any cause which would be considered a good one for a postponement in a civil case, is sufficient in a criminal action.

History: En. Sec. 270, p. 232, Cod. Stat. 1871; re-en. Sec. 270, 3d Div. Rev. Stat. 1879; re-en. Sec. 271, 3d Div. Comp. Stat.

1887; re-en. Sec. 2011, Pen. C. 1895; re-en. Sec. 9239, Rev. C. 1907; re-en. Sec. 11937, R. C. M. 1921. Cal. Pen. C. Sec. 1052.

Operation and Effect

In the absence of a showing of abuse of discretion an order refusing continuance of a criminal trial, asked for on the grounds that a large portion of the persons qualified for jury duty in the county were prejudiced, will be affirmed. *State v. Collins*, 88 M 514, 519, 294 P 957.

References

Cited or applied as section 270, p. 232, Codified Statutes 1871, in *Territory v. Perkins*, 2 M 467.

Criminal Law 589 (1).

22 C.J.S. Criminal Law §§ 483, 501.

See generally, 12 Am. Jur. 447, Continuances.

Continuance to permit proof of allegation that negroes were excluded from jury list in criminal case. 52 ALR 930.

Hostile sentiment or prejudice as ground for continuance. 86 ALR 1249.

Right to continuance because counsel is in attendance at another court. 112 ALR 593.

94-7011. (11938) State may have continuance. The state may obtain a postponement for the same reasons, and must give the same notice therefor as the defendant, and be subject to the same restrictions; the county attorney, or any one acquainted with the facts, may make the proper affidavit.

History: En. Sec. 271, p. 232, Cod. Stat. 1871; re-en. Sec. 271, 3d Div. Rev. Stat. 1879; re-en. Sec. 272, 3d Div. Comp. Stat. 1887; re-en. Sec. 2012, Pen. C. 1895; re-en.

Sec. 9240, Rev. C. 1907; re-en. Sec. 11938, R. C. M. 1921.

Criminal Law 581.

22 C.J.S. Criminal Law § 482.

94-7012. (11939) Effect of failure to apply. If neither the defendant nor the state notify the court at the time the defendant pleads of a desire for a postponement, they shall not be entitled to make the application thereafter for any cause which existed at that time, and of which the party making the application had knowledge, or could have had knowledge; any application made after that time must be for cause which arose, or had come to the knowledge of the applicant, since the making of the plea.

History: En. Sec. 272, p. 233, Cod. Stat. 1871; re-en. Sec. 272, 3d Div. Rev. Stat. 1879; re-en. Sec. 273, 3d Div. Comp. Stat. 1887; re-en. Sec. 2013, Pen. C. 1895; re-en. Sec. 9241, Rev. C. 1907; re-en. Sec. 11939, R. C. M. 1921.

References.

State v. Showen, 60 M 474, 477, 199 P 917.

Criminal Law 617.

22 C.J.S. Criminal Law § 525.

94-7013. (11940) Case set for trial. If the case is not postponed, it must be set down for trial on some certain day, in the order in which it appears on the calendar, unless by consent it is set down for trial out of its order.

History: En. Sec. 273, p. 233, Cod. Stat. 1871; re-en. Sec. 273, 3d Div. Rev. Stat. 1879; re-en. Sec. 274, 3d Div. Comp. Stat. 1887; re-en. Sec. 2014, Pen. C. 1895; re-en. Sec. 9242, Rev. C. 1907; re-en. Sec. 11940, R. C. M. 1921.

calendar, unless by consent it is set down for trial out of its order, are directory only, the district court having power to control its docket and the order in which it may try cases. *State v. Quinlan*, 84 M 364, 369, 275 P 750.

Operation and Effect

Section 94-7006, requiring the clerk of the district court to keep a calendar of criminal actions enumerated according to the date of filing the information; section 94-7007, declaring that the calendar must be disposed of in the order therein named unless the court shall direct otherwise, and this section, providing that if a case is not postponed it must be set for hearing in the order in which it appears on the

References

Cited or applied as section 2014, Penal Code, in *State v. Mitchell*, 17 M 67, 75, 42 P 100.

Criminal Law 575.

22 C.J.S. Criminal Law § 467.

Remedy for delay in bringing accused to trial. 58 ALR 1510.

Waiver or loss of defendant's right to speedy trial in criminal case. 129 ALR 572.

CHAPTER 71

CHALLENGING THE JURY

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 94-7127. Decision of court to be entered.
 94-7128. Challenges, how taken.

94-7101. (11941) Definition and division of challenges. A challenge is an objection made to the trial jurors, and is of two kinds:

1. To the panel.
2. To an individual juror:

History: Ap. p. Sec. 283, p. 234, Cod. Stat. 1871; re-en. Sec. 283, 3d Div. Rev. Stat. 1879; re-en. Sec. 284, 3d Div. Comp. Stat. 1887; en. Sec. 2030, Pen. C. 1895; re-en. Sec. 9243, Rev. C. 1907; re-en. Sec. 11941, R. C. M. 1921. Cal. Pen. C. Sec. 1055.
 Jury⊕115, 125.
 50 C.J.S. Juries §§ 247, 261, 268, 271.
 31 Am. Jur. 640, Jury, § 112.

94-7102. (11942) Defendants cannot sever in challenges. When the several defendants are tried together, they cannot sever their challenges, but must join therein.

History: En. Sec. 2031, Pen. C. 1895; re-en. Sec. 9244, Rev. C. 1907; re-en. Sec. 11942, R. C. M. 1921. Cal. Pen. C. Sec. 1056.
References
 Cited or applied as section 9244, Revised Codes, in Mullery v. Great Northern Ry. Co., 50 M 408, 416, 148 P 323.
 Jury⊕118, 129.
 50 C.J.S. Juries §§ 264, 272.

94-7103. (11943) Panel defined. The panel is a list of jurors returned by a sheriff to serve at a particular court, or for trial of a particular action.

History: En. Sec. 2032, Pen. C. 1895; re-en. Sec. 9245, Rev. C. 1907; re-en. Sec. 11943, R. C. M. 1921. Cal. Pen. C. Sec. 1057.
 Jury⊕66 (1).
 50 C.J.S. Juries §§ 166, 175.

94-7104. (11944) Challenge to the panel defined. A challenge to the panel is an objection made to all the jurors returned, and may be taken by either party.

History: En. Sec. 2033, Pen. C. 1895; 11944, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9246, Rev. C. 1907; re-en. Sec. 1058.

94-7105. (11945) Upon what founded. A challenge to the panel can be founded only on a material departure from law in respect to the drawing and return of the jury as in civil actions, or on the intentional omission of the sheriff to summon one or more of the jurors drawn.

History: Ap. p. Sec. 284, p. 234, Cod. Stat. 1871; re-en. Sec. 284, 3d Div. Rev. Stat. 1879; re-en. Sec. 285, 3d Div. Comp. Stat. 1887; en. Sec. 2034, Pen. C. 1895; re-en. Sec. 9247, Rev. C. 1907; re-en. Sec. 11945, R. C. M. 1921. Cal. Pen. C. Sec. 1059.

Operation and Effect

A substantial compliance with the law is required in the work of procuring a jury. Anything less will vitiate such work. *State v. Tighe*, 27 M 327, 331, 71 P 3; *State v. Landry*, 29 M 218, 224, 74 P 418; *State v. Groom*, 49 M 354, 358, 141 P 858.

It is not every deviation from the strict letter of the law in drawing or returning a jury that will furnish ground for a challenge. The departure must be a material one. *State v. Tighe*, 27 M 327, 331, 71 P 3; *State v. Groom*, 49 M 354, 359, 141 P 858.

Evidence adduced on the trial of a challenge to the jury panel on the second ground of challenge specified in this section, the sheriff having testified that his omission to summon some of the jurors was

occasioned by his imperfect knowledge of county lines incident to the creation of a new county, held sufficient to warrant the court in sustaining the challenge. *State v. Groom*, 49 M 354, 358, 141 P 858.

Id. Where defendant, charged with crime, interposed a challenge to the jury panel because the sheriff had intentionally omitted to summon some of the jurors drawn by the jury commission, to which the state took an exception, the court erred in overruling the challenge on the ground that defendant had failed to sustain the burden of establishing the truth of his assertion, since by its exception, which was in effect a demurrer, the facts stood admitted by the state, and no burden rested upon defendant.

References

Cited or applied as section 2034, Penal Code, in *State ex rel. Breen v. District Court*, 34 M 107, 111, 85 P 870.

Jury⊕116.

50 C.J.S. Juries § 262.

94-7106. (11946) When and how taken. A challenge to the panel must be taken before the jurors are sworn, and must be in writing or be noted by the stenographer, and must plainly and distinctly state the facts constituting the ground of challenge.

History: Ap. p. Sec. 285, p. 234, Cod. Stat. 1871; re-en. Sec. 285, 3d Div. Rev. Stat. 1879; re-en. Sec. 286, 3d Div. Comp. Stat. 1887; en. Sec. 2035, Pen. C. 1895; re-en. Sec. 9248, Rev. C. 1907; re-en. Sec. 11946, R. C. M. 1921. Cal. Pen. C. Sec. 1060.

Summoning Jury by Interested Sheriff

The facts that the victim of a homicide was a deputy sheriff, and that the sheriff was a witness for the state, did

not disqualify the latter or his deputies from summoning the jury on the theory that they were interested in the outcome of the prosecution; if they were disqualified, the remedy of defendant was to object to the panel before sworn. *State v. Heaston*, 109 M 303, 314, 97 P 2d 330.

Jury⊕117, 118.

50 C.J.S. Juries §§ 263, 264.

31 Am. Jur. 641, Jury, § 113.

94-7107. (11947) Exception, if sufficiency of the challenge be denied. If the sufficiency of the facts alleged as ground of the challenge is denied, the adverse party may except to the challenge. The exception need not be in writing, but must be entered on the minutes of the court, or of the stenographer, and thereupon the court must proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true.

History: En. Sec. 2036, Pen. C. 1895; re-en. Sec. 9249, Rev. C. 1907; re-en. Sec. 11947, R. C. M. 1921. Cal. Pen. C. Sec. 1061.

Operation and Effect

In a criminal case, a demurrer to a challenge to the jury panel is equivalent to an exception to the challenge, the mere name not being important; and the action of the court in sustaining a demurrer to such challenge, and in impaneling the jury,

amounted to a disallowance of the challenge, so as to render the question raised by the challenge reviewable on appeal. *State v. Tighe*, 27 M 327, 330, 71 P 3.

An exception to the challenge to a jury panel in a criminal case is, in effect, a demurrer, and admits all the facts stated to be true. *State v. Groom*, 49 M 354, 357, 141 P 858.

Jury \hookrightarrow 119.

50 C.J.S. Juries § 266.

94-7108. (11948) If exception overruled, court may allow denial, etc. If, on the exception, the court finds the challenge sufficient, it may, if justice requires it, permit the party excepting to withdraw his exception, and to deny the facts alleged in the challenge. If the exception is allowed, the court may, in like manner, permit an amendment of the challenge.

History: En. Sec. 2037, Pen. C. 1895; re-en. Sec. 9250, Rev. C. 1907; re-en. Sec. 11948, R. C. M. 1921. Cal. Pen. C. Sec. 1062.

References

Cited or applied as section 2037, Penal Code, in *State v. Tighe*, 27 M 327, 330, 71 P 3.

Jury \hookrightarrow 121.

50 C.J.S. Juries § 266.

94-7109. (11949) Denial of challenge, how made, and trial thereof. If the challenge is denied, the denial may be oral, and must be entered on the minutes of the court, or of the stenographer, and the court must proceed to try the question of fact; and, upon such trial, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge.

History: En. Sec. 2038, Pen. C. 1895; re-en. Sec. 9251, Rev. C. 1907; re-en. Sec. 11949, R. C. M. 1921. Cal. Pen. C. Sec. 1063.

Operation and Effect

Where defendant's offer to submit a challenge to the panel on the testimony taken at a prior term of court was withdrawn, and no evidence whatever was offered, defendant's request to discharge the jury was properly denied. *State v. Jones*, 32 M 442, 449, 80 P 1095.

Query, whether a judge of the district court may be called as a witness when the regularity of the drawing of a jury in a criminal prosecution is questioned by a challenge to the panel, inasmuch as he or-

ders such drawing and directs the clerk during its progress, under section 93-1502. and, under this section, both judicial and ministerial officers whose irregularity is complained of may be called upon to testify. *State ex rel. Breen v. District Court*, 34 M 107, 111, 85 P 870.

Where all parties treat a challenge to the panel as raising an issue of fact under this section, the supreme court will treat the matter as though an issue had been raised by a denial of the challenge. *State v. Groom*, 49 M 354, 357, 141 P 858.

References

Cited or applied as section 2038, Penal Code, in *State v. Tighe*, 27 M 327, 330, 71 P 3.

94-7110. (11950) Proceedings, if challenge allowed. If, either upon an exception to the challenge or a denial of the facts, the challenge is allowed, the court must discharge the jury, so far as the trial in question is concerned. If it is disallowed, the court must direct the jury to be impaneled.

History: En. Sec. 2039, Pen. C. 1895; re-en. Sec. 9252, Rev. C. 1907; re-en. Sec. 11950, R. C. M. 1921. Cal. Pen. C. Sec. 1065.

References

Cited or applied as section 2039, Penal Code, in *State v. Tighe*, 27 M 327, 330, 71 P 3.

94-7111. (11951) Kinds of challenges to individual juror. A challenge to an individual juror is either—

1. Peremptory, or,
2. For cause.

History: En. Sec. 2040, Pen. C. 1895; re-en. Sec. 9253, Rev. C. 1907; re-en. Sec. 11951, R. C. M. 1921. Cal. Pen. C. Sec. 1067.

Jury ⊕ 125, 135.
50 C.J.S. Juries §§ 247, 268, 271, 280.
31 Am. Jur. 650, Jury, §§ 122 et seq.

94-7112. (11952) Challenge, when taken. All challenges must be interposed before the jury is sworn, unless the cause of challenge be discovered after the jury is sworn and before the introduction of any evidence, when the court, in its discretion, may allow the challenge to be interposed.

History: En. Sec. 2041, Pen. C. 1895; re-en. Sec. 9254, Rev. C. 1907; re-en. Sec. 11952, R. C. M. 1921. Cal. Pen. C. Sec. 1068.

Jury ⊕ 127, 137 (1).
50 C.J.S. Juries §§ 270, 282.
31 Am. Jur. 641, Jury, § 113.

94-7113. (11953) Challenge after jury sworn. Whenever a juror is excused from the jury, after it is sworn, upon challenge of either party, the panel must be filled in the same manner as before the swearing of the jury.

History: En. Sec. 2042, Pen. C. 1895; re-en. Sec. 9255, Rev. C. 1907; re-en. Sec. 11953, R. C. M. 1921.

94-7114. (11954) Peremptory challenge, what, and how taken. A peremptory challenge can be taken by either party, and may be oral. It is an objection to a juror for which no reason need be given, but upon which the court must exclude him.

History: En. Sec. 2043, Pen. C. 1895; re-en. Sec. 9256, Rev. C. 1907; re-en. Sec. 11954, R. C. M. 1921. Cal. Pen. C. Sec. 1069.

Jury ⊕ 135.
50 C.J.S. Juries § 280.
31 Am. Jur. 694, Jury, §§ 185 et seq.
Excusing qualified juror drawn in criminal case as ground of complaint by defendant. 96 ALR 508.

94-7115. (11955) Number of peremptory challenges. The defendant is entitled to a peremptory challenge of jurors in the following cases, and to the number as follows:

1. If the offense charged be punishable with death, or by imprisonment for life, challenges to the number of ten.
2. If the offense be punishable with imprisonment in the state prison not less than a specified number of years, and no limit to the duration of such imprisonment is declared, to the number of eight.
3. In any other case punishable with imprisonment in the state prison, to the number of six.
4. In all other cases, to the number of four.

History: En. Sec. 156, p. 241, Bannack Stat.; re-en. Sec. 277, p. 233, Cod. Stat. 1871; re-en. Sec. 277, 3d Div. Rev. Stat. 1879; re-en. Sec. 278, 3d Div. Comp. Stat. 1887; amd. Sec. 2044, Pen. C. 1895; re-en. Sec. 9257, Rev. C. 1907; re-en. Sec. 11955, R. C. M. 1921. Cal. Pen. C. Sec. 1070.

Operation and Effect

In a prosecution for murder, the accused was properly compelled to exhaust alternately two peremptory challenges to each one taken by the state, where none were taken until the panel was full. *State v. Sloan*, 22 M 293, 298, 56 P 364.

Defendant, on trial for grand larceny aggravated by a prior conviction of the same offense, was, under subdivision 2 of this section, entitled to eight—not six—peremptory challenges. *State v. Collins*, 53 M 213, 163 P 102.

References

Cited or applied as section 9257, Revised

Codes, in *State v. Collins*, 53 M 213, 163 P 102.

Jury ⇨ 136 (5).

50 C.J.S. *Juries* § 281.

31 Am. Jur. 694, *Jury*, §§ 185 et seq.

Number of peremptory challenges allowable where there are two or more parties on the same side. 136 ALR 417.

94-7116. (11956) **Challenges of state.** The state may challenge the same number of jurors allowed the defendant.

History: En. Sec. 157, p. 241, *Bannack Stat.*; re-en. Sec. 278, p. 233, *Cod. Stat.* 1871; re-en. Sec. 278, 3d Div. *Rev. Stat.* 1879; re-en. Sec. 279, 3d Div. *Comp. Stat.* 1887; amd. Sec. 2045, *Pen. C.* 1895; re-en. Sec. 9258, *Rev. C.* 1907; re-en. Sec. 11956, *R. C. M.* 1921; amd. Sec. 1, Ch. 4, *L.* 1925.

References

Cited or applied as section 2045, *Penal Code*, in *State v. Sloan*, 22 M 293, 298, 56 P 364.

94-7117. (11957) **Definition and kinds of challenge, for cause.** A challenge for cause may be taken by either party. It is an objection to a particular juror, and is either—

1. General—That the juror is disqualified from serving in any case; or,
2. Particular—That the juror is disqualified from serving in the action on trial.

History: En. Sec. 2046, *Pen. C.* 1895; re-en. Sec. 9259, *Rev. C.* 1907; re-en. Sec. 11957, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 1071.

brother-in-law of the prosecuting attorney. *State v. Cadotte*, 17 M 315, 316, 42 P 857.

References

State v. Russell, 73 M 240, 243, 235 P 712.

Operation and Effect

A juror who, upon examination, has shown no bias, either implied or actual, is not disqualified by reason of being a

Jury ⇨ 125.

50 C.J.S. *Juries* §§ 247, 268, 271.

94-7118. (11958) **General causes of challenge.** General causes of challenge are—

1. A conviction for felony;
2. A want of any of the qualifications prescribed by law to render a person a competent juror;
3. Unsoundness of mind, or such defect in the faculties of the mind or organs of the body as renders him incapable of performing the duties of a juror.

History: En. Sec. 286, p. 234, *Cod. Stat.* 1871; re-en. Sec. 286, 3d Div. *Rev. Stat.* 1879; amd. Sec. 1, p. 54, *L.* 1881; re-en. Sec. 287, 3d Div. *Comp. Stat.* 1887; amd. Sec. 2047, *Pen. C.* 1895; re-en. Sec. 9260,

Rev. C. 1907; re-en. Sec. 11958, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 1072.

Jury ⇨ 126.

50 C.J.S. *Juries* § 269.

31 Am. Jur. 650, *Jury*, §§ 122 et seq.

94-7119. (11959) **Particular causes of challenge.** Particular causes of challenge are of two kinds—

1. For such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.

2. For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him

from acting with entire impartiality and without prejudice to the substantial rights of either party, which is known in this code as actual bias.

History: En. Sec. 2048, Pen. C. 1895; re-en. Sec. 9261, Rev. C. 1907; re-en. Sec. 11959, R. C. M. 1921. Cal. Pen. C. Sec. 1073.

Cause for Challenge Must be Alleged

The provision of section 94-7122, that in challenging a juror for implied bias one or more of the causes stated in section 94-7120, and in challenging for actual bias the cause stated in subdivision 2 of this section, must be alleged, is mandatory; hence where this is not done, denial of the challenge does not entitle appellant to allege error. *State v. Vetter*, 76 M 574, 584, 248 P 179.

Causes Enumerated Not Exclusive

The constitutional provision (Art. III, Sec. 16) that one accused of crime shall have the right to trial by an impartial jury is a limitation upon the power of the legislature and it is beyond its power to curtail it; hence, where it clearly appears from the examination of a juror on his voir dire that some circumstance or connection with the case renders him unfit to serve, he should be disqualified even though the cause does not fall within any of those specified in the statute. *State v. Russell*, 73 M 240, 244, 235 P 712.

Effect of Juror Admitting Bias

Where a juror in a criminal case on examination first admits bias in favor of defendant, but later states that notwithstanding such bias he can consider the evidence impartially, the latter statement should be received with caution. *State v. Huffman*, 89 M 194, 197, 296 P 789.

Nature of Right to Challenge

The right to challenge is the right to reject, not to select, a juror, and no person can acquire a vested right to have any particular member of a panel sit upon his case until such member has been accepted and sworn. *State v. Huffman*, 89 M 194, 197, 296 P 789.

Operation and Effect

After verdict, the accused must make it appear affirmatively that he is entitled to a new trial because he has been deprived of his constitutional right to an impartial jury, and the probability that one juror was incompetent is not sufficient to set aside the verdict. In the absence of a

clear showing of an abuse of discretion by the trial court in passing on a motion for a new trial, based on the alleged incompetency of a juror, the supreme court will not interfere. *State v. Mott*, 29 M 292, 307, 74 P 728.

A juror who testified on his voir dire examination that he entertained a bitter prejudice against the Industrial Workers of the World and against every member of it, which would abide with him throughout the trial, that it would require evidence to remove the prejudice, and less evidence to convict defendant, who was a member of the organization, than if he were not a member, was not an impartial juror, and refusal to grant a challenge for cause was error. *State v. Brooks*, 57 M 480, 188 P 942.

Where one had served as a juror in a prosecution for rape he was not disqualified, as for actual bias, from serving in the same capacity in a later case of the same character against another defendant in which the prosecutrix was the same as in the first, by the fact that on the former trial evidence of the guilt of the latter defendant had been introduced. (*Mr. Justice Galen dissenting.*) *State v. Russell*, 73 M 240, 244, 235 P 712.

When Trial Judge Should Sustain Challenge

✓ On the voir dire examination of a prospective juror the trial court is the judge of the weight to be given to his testimony, and if it has any doubt as to the existence of such a state of mind in a juror as would disqualify him, it should sustain a challenge to him in the interest of justice. *State v. Huffman*, 89 M 194, 197, 296 P 789.

References

Cited or applied as section 2048, Penal Code, in *State v. Cadotte*, 17 M 315, 316, 42 P 857.

Jury 97 (1) et seq.
50 C.J.S. *Juries* § 226 et seq.
31 Am. Jur. 658, *Jury*, §§ 133 et seq.
Right to interrogate juror on voir dire as to prejudice for or against particular class of witnesses. 1 ALR 1688.
Racial, religious, social or political prejudice of proposed juror as proper subject of inquiry or ground of challenge on voir dire in criminal case. 73 ALR 1208.

94-7120. (11960) Ground of challenge for implied bias. A challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or relationship to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant.

2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, debtor and creditor, to, or being a member of, the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment.

3. Being a party adverse to the defendant in a civil action, or having complained against or been accused by him in a criminal prosecution.

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information.

5. Having served on a trial jury which has tried another person for the offense charged.

6. Having been one of a jury formerly sworn to try the same charge, and whose verdict was set aside or which was discharged without verdict, after the case was submitted to it.

7. Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror.

9. Having a belief that the punishment fixed by law is too severe for the offense charged.

History: En. Sec. 286, p. 234, *Cod. Stat.* 1871; re-en. Sec. 286, 3d Div. *Rev. Stat.* 1879; amd. Sec. 1, p. 54, L. 1881; re-en. Sec. 287, 3d Div. *Comp. Stat.* 1887; amd. Sec. 2049, *Pen. C.* 1895; re-en. Sec. 9262, *Rev. C.* 1907; re-en. Sec. 11960, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 1074.

Operation and Effect

It will be readily seen, by a comparison of the alleged cause for challenge in the first question presented with the above-quoted causes of challenge for "implied bias," that the challenge did not allege any one of the statutory causes, and therefore does not comply with the requirement of section 94-7122, that "one or more of the causes stated in" this section must be alleged. "A juror is not incompetent because he has previously served upon the trial of another defendant charged with a separate and distinct offense, although of the same character, and proved by the same witness or witnesses." *State v. Russell*, 73 M 240, 244, 235 P 712.

The provision of section 94-7122, that in challenging a juror for implied bias one or more of the causes stated in this section, and in challenging for actual bias the cause stated in subdivision 2 of section 94-7119, must be alleged, is man-

datory; hence where this is not done, denial of the challenge does not entitle appellant to allege error. *State v. Vetter*, 76 M 574, 584, 248 P 179.

After conviction of defendant of murder in the first degree, which crime he confessed, pleading insanity, he moved for a new trial upon the ground, among others, that a member of the jury had been guilty of misconduct in concealing from the court, while under examination on his voir dire, the fact that after the arrest of defendant, he, as correspondent for the newspaper published at the county seat, had furnished it articles, which were published, in effect complimenting the officers for their quick action in apprehending the "murderer" whose "worthless carcass will lie to rot deeply buried when the wheels of justice cease to grind," etc. The motion was denied. Held, in answer to the contention that the court abused its discretion in denying it, that in view of the explanation of his conduct by the juror on the hearing of the motion that the articles were not intended to be personal as applied to defendant, whom he did not know, but applicable to anyone who committed homicide, and the advantageous position of the trial judge in passing upon the sincerity and truth of the statements

of the juror on his examination touching his competency as well as on the hearing of the motion, that the court did not err in its ruling. (Justices Angstman and Stewart dissenting.) *State v. Hoffman*, 94 M 573, 586, 23 P 2d 972. See also *State v. Huffman*, 89 M 194, 197, 296 P 789.

Subd. 4

Duty of Attorneys to Advise Court That Coroner's Juror Serving as Trial Juror

Where the voir dire examination of a trial juror in a murder case failed to reveal the fact that he had served on the coroner's jury which had investigated the occurrence, known to the county attorney

who directed proceedings at the inquest, and discovered by defense counsel after trial jury had been sworn, it was the duty of both to advise the trial court at the earliest opportunity to prevent a mistrial instead of remaining silent until verdict of guilty returned when defense counsel presented the matter in affidavits on motion for new trial. *State v. Allison*, 116 M 352, 364, 153 P 2d 141.

Jury ⇨ 87 et seq., 105 (1-4).

50 C.J.S. Juries §§ 212, 215 et seq., 226, 242-244 et seq.

Contributing to fund for prosecution as disqualifying juror. 1 ALR 519.

94-7121. (11961) Exemption not a ground of challenge. An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.

History: En. Sec. 2050, Pen. C. 1895; re-en. Sec. 9263, Rev. C. 1907; re-en. Sec. 11961, R. C. M. 1921. Cal. Pen. C. Sec. 1075.

Jury ⇨ 126.

50 C.J.S. Juries § 269.

94-7122. (11962) Causes of challenge, how stated. In a challenge for implied bias, one or more of the causes stated in section 94-7120 must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of section 94-7119 must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety, provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him. The challenge may be oral, but must be entered in the minutes of the court or of the stenographer.

History: En. Sec. 2051, Pen. C. 1895; re-en. Sec. 9264, Rev. C. 1907; re-en. Sec. 11962, R. C. M. 1921. Cal. Pen. C. Sec. 1076.

Constitutionality

This statute is constitutional. *Territory v. Bryson*, 9 M 32, 39, 22 P 147; *State v. Sheerin*, 12 M 539, 541, 31 P 543; *State v. Martin*, 29 M 273, 277, 74 P 725; *State v. Mott*, 29 M 292, 306, 74 P 728.

Juror With an Opinion Based on Newspaper Story or Hearsay

A juror who has formed and expressed an opinion on the case from reading newspaper statements and from hearsay, but who states that he does not know the defendant, has no prejudice, and, notwithstanding such opinion, can impartially try the case, is competent. *State v. Sheerin*, 12 M 539, 541, 31 P 543.

Where a venireman in a criminal case stated on his voir dire that he had read the newspaper accounts of the alleged rob-

bery, and had formed an opinion, but not a fixed one, and on re-examination he said he could entirely discard the opinion thus formed, and give the defendant as fair a trial as if he had never heard of the case, he was competent as a juror. *State v. Howard*, 30 M 518, 523, 77 P 50.

General challenges of jurors "for the purposes of the record" who while stating on their voir dire that they had read the newspaper account of the killing of deceased and were of the opinion at the time that he had been murdered, did not state that they had any belief that defendant had committed the crime, but did say that they would follow the instructions of the court and render an impartial verdict, were properly denied. *State v. Byrne*, 60 M 317, 328, 199 P 262.

A juror who on his voir dire stated that he had read in the newspapers an account of the homicide for which plaintiff was on trial; that he had formed an opinion therefrom which it would take evidence to remove, but that in determining the

case he would base his verdict upon the evidence and be bound by the court's instructions; that there was nothing known to him which would prevent his trying the case fairly, etc., held competent. *State v. Juhrey*, 61 M 413, 202 P 762.

Where a juror on his voir dire stated that from newspaper reports and conversations with others he had formed the opinion that murder had been committed, but had no opinion as to the guilt or innocence of the defendant, that he would require the state to prove beyond a reasonable doubt that the latter had killed deceased with malice aforethought before he would vote for a conviction, and that he could fairly and impartially try him, he was not disqualified from serving. *State v. Vetter*, 76 M 574, 585, 586, 248 P 179.

After conviction of defendant of murder in the first degree, which crime he confessed, pleading insanity, he moved for a new trial upon the ground, among others, that a member of the jury had been guilty of misconduct in concealing from the court, while under examination on his voir dire, the fact that after the arrest of defendant, he, as correspondent for the newspaper published at the county seat, had furnished it articles, which were published, in effect complimenting the officers for their quick action in apprehending the "murderer" whose "worthless carcass will lie to rot deeply buried when the wheels of justice cease to grind," etc. The motion was denied. Held, in answer to the contention that the court abused its discre-

tion in denying it, that in view of the explanation of his conduct by the juror on the hearing of the motion that the articles were not intended to be personal as applied to defendant, whom he did not know, but applicable to anyone who committed homicide, and the advantageous position of the trial judge in passing upon the sincerity and truth of the statements of the juror on his examination touching his competency as well as on the hearing of the motion, that the court did not err in its ruling. (Justices Angstman and Stewart dissenting.) *State v. Hoffman*, 94 M 573, 585 et seq., 23 P 2d 972.

Where a juror on his voir dire in a homicide case first stated that he had formed an opinion based on talks with others and on newspaper accounts, but later upon being questioned by the court replied that he could give a fair and impartial verdict despite his opinion and that his opinion was based only on rumor, the court's denial of defendant's challenge for cause, held not error. *State v. Simpson*, 109 M 198, 206, 95 P 2d 761.

References

Cited or applied as section 9264, Revised Codes, in *Shane v. Butte Electric Ry. Co.*, 37 M 599, 602, 97 P 958; *State v. Brooks*, 57 M 480, 488, 188 P 942; *State v. Russell*, 73 M 240, 244, 245, 235 P 712.

Jury⇐129.

50 C.J.S. Juries § 272.

94-7123. (11963) **Exceptions to challenge and denial thereof.** The adverse party may except to the challenge in the same manner as to a challenge to the panel, and the same proceedings must be had thereon as are prescribed in section 94-7107, except that if the exception be allowed, the juror must be excluded. The adverse party may also orally deny the facts alleged as the ground of challenge.

History: En. Sec. 2052, Pen. C. 1895; re-en. Sec. 9265, Rev. C. 1907; re-en. Sec. 11963, R. C. M. 1921. Cal. Pen. C. Sec. 1077.

Jury⇐130.

50 C.J.S. Juries § 272.

94-7124. (11964) **Challenge, how tried.** If the facts are denied, the challenge must be tried by the court.

History: En. Sec. 2053, Pen. C. 1895; re-en. Sec. 9266, Rev. C. 1907; re-en. Sec. 11964, R. C. M. 1921. Cal. Pen. C. Sec. 1078.

Jury⇐133.

50 C.J.S. Juries § 278.

94-7125. (11965) **Juror challenged may be examined as a witness.** Upon the trial of a challenge to an individual juror the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry.

History: En. Sec. 2054, Pen. C. 1895; re-en. Sec. 9267, Rev. C. 1907; re-en. Sec. 11965, R. C. M. 1921. Cal. Pen. C. Sec. 1081.

Jury⇨131 (1-18).

50 C.J.S. Juries §§ 273, 274, 275, 276.

94-7126. (11966) **Rules of evidence on trial of challenge.** Other witnesses may also be examined on either side, and the rules of evidence applicable to the trial of other issues govern the admission or exclusion of evidence on the trial of the challenge.

History: En. Sec. 2055, Pen. C. 1895; re-en. Sec. 9268, Rev. C. 1907; re-en. Sec. 11966, R. C. M. 1921. Cal. Pen. C. Sec. 1082.

Jury⇨132.
50 C.J.S. Juries § 277.

94-7127. (11967) **Decision of court to be entered.** The court must allow or disallow the challenge, and its decision must be entered in the minutes of the court.

History: En. Sec. 2056, Pen. C. 1895; re-en. Sec. 9269, Rev. C. 1907; re-en. Sec. 11967, R. C. M. 1921. Cal. Pen. C. Sec. 1083.

94-7128. (11968) **Challenges, how taken.** Challenges for cause and peremptory challenges must be taken in the manner provided in sections 93-5010, 93-5013 and 93-5014.

History: En. Sec. 2057, Pen. C. 1895; re-en. Sec. 9270, Rev. C. 1907; re-en. Sec. 11968, R. C. M. 1921.

Operation and Effect

Where either party fails to challenge in his turn, he is deemed to waive the challenge or challenges he might use at that time, but this rule goes no further than is necessary to preserve the alternation required by the statute. *State v. Peel*, 23 M 358, 362, 59 P 169. See also *Chenoweth v. Great Northern Ry. Co.*, 50 M 481, 485, 148 P 330.

Where the state waived its fourth peremptory challenge, and the defendant exhausted his peremptory challenges, it was

not error, on the panel's being filled and passed for cause, to permit the state to peremptorily challenge a juror who was in the box when the state waived its fourth challenge; the state's waiver of its fourth challenge was not a waiver of any subsequent challenge to which it was entitled. *State v. Peel*, 23 M 358, 363, 59 P 169.

References

Cited or applied as section 2057, Penal Code, in *State v. Sloan*, 22 M 293, 298, 56 P 364.

Jury⇨129, 139.

50 C.J.S. Juries §§ 272, 280.

CHAPTER 72

THE TRIAL

- Section 94-7201. Order of trial.
94-7202. When order of trial may be departed from.
94-7203. Defendant presumed innocent—reasonable doubt.
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- 94-7220. Conviction on testimony of accomplice.
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- 94-7225. Same.
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- 94-7230. Jurors, separation of, during trial.
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- 94-7232. Jurors becoming unable to perform duties.
- 94-7233. Court to decide questions of law arising during trial.
- 94-7234. Conviction or acquittal.
- 94-7235. On indictment for libel, jury to determine law and fact.
- 94-7236. In all other cases court to decide questions of law.
- 94-7237. Jury may decide in court, or retire in custody of officer.
- 94-7238. Defendant appearing for trial may be committed.
- 94-7239. If county attorney fails to attend, court may appoint.
- 94-7240. Trials for larceny.

94-7201. (11969) Order of trial. 1. The county attorney must state the case and offer evidence in support of the prosecution.

2. The defendant, or his counsel, may then state his defense and offer evidence in support thereof.

3. The parties may respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.

4. When the evidence is concluded, if either party desires special instructions to be given to the jury, such instructions shall be reduced to writing and numbered by the party, or his attorney, and together with a written request asking the same, and signed by the party, or his attorney, delivered to the court. At all times prior to the charging of the jury the instructions to be given shall be, without the presence of the jury, settled by the court, at which settlement counsel for the parties shall be allowed reasonable opportunity to examine the instructions requested and proposed to be given by the court, and to present and argue to the court objections and exceptions to the adoption or rejection of any instruction offered by counsel or proposed to be given to the jury by the court. On such settlement of the instructions the respective counsel, or the parties, shall specify and state the particular ground on which the instruction is objected or excepted to, and it shall not be sufficient in stating the ground of such objection or exception to state generally that the instruction does not state the law, or is against law, but such ground of objection or exception shall specify particularly wherein the instruction is insufficient, or does not state the law, or what particular clause therein is objected to.

The court shall pass upon the objection to the instructions requested and also those proposed to be given by the court, and shall either give each instruction as requested or positively refuse to do so, or give the instruction requested with a modification, and shall mark or endorse upon each instruction offered and requested by the parties in such manner that it shall

distinctly appear what instructions were given in whole or in part, and in like manner those refused or modified, and if modified, wherein the modification consisted. The court shall also give the instructions as originally proposed to be given by the court, or as modified, and all the instructions given by the court, together with those refused, must be filed as a part of the record of the cause.

The court stenographer shall be present at such settlement and shall take down all the objections and exceptions of the respective counsel to all or any of the instructions given or refused by the court together with the modifications made therein, and the ruling of the court thereon, and at the close of the trial such objections and exceptions taken during the settlement, together with the ruling of the court thereon, must be written out at length or printed in type by the stenographer and filed with the clerk forthwith, and thereafter such exceptions may be settled in a bill of exceptions as provided in section 94-7507.

No motion for new trial on the ground of errors in the instructions given shall be granted by the district court unless the error so assigned was specifically pointed out and excepted to at the settlement of the instructions, as herein provided; and no cause shall be reversed by the supreme court for any error in instructions which was not specifically pointed out and excepted to at the settlement of the instructions herein specified, and such error and exception incorporated in and settled in the bill of exceptions, as herein provided.

5. When the instructions have been passed upon and settled by the court, and before the arguments of counsel to the jury have begun, the court shall charge the jury in writing, giving in such charge only such instructions as are passed upon and settled at such settlement. In charging the jury, the court shall give to them all matters of law which it thinks necessary for its information in rendering a verdict.

6. When the jury has been charged, unless the case is submitted to the jury, on either side, or on both sides, without argument, the plaintiff must commence and may conclude the argument. If several defendants, having several defenses, appear by different counsel, the court must determine their relative order in the evidence and argument. Counsel, in arguing the case to the jury, may argue and comment upon the law of the case, as given in the instructions of the court, as well as upon the evidence of the case.

History: Earlier acts were Sec. 306, p. 236, Cod. Stat. 1871; re-en. Sec. 306, 3d Div. Rev. Stat. 1879; re-en. Sec. 307, 3d Div. Comp. Stat. 1887; en. Sec. 2070, Pen. C. 1895; amd. Sec. 1, p. 173, L. 1901.

This section en. Sec. 1, Ch. 82, L. 1907; Sec. 9271, Rev. C. 1907; re-en. Sec. 11969, R. C. M. 1921. Cal. Pen. C. Sec. 1093.

had at the settlement thereof, are incorporated in a bill of exceptions, even though they constitute a part of the judgment-roll of technical record, section 12043, R. C. M. 1921 (omitted), providing otherwise, having been superseded by this section. *State v. Carmichael*, 62 M 159, 161, 204 P 362; *State v. Zorn*, 99 M 63, 41 P 2d 513.

Instructions

Bill of Exceptions Required to Review Instructions

Under this section, errors in giving or refusing instructions cannot be reviewed on appeal unless they, with the proceedings

Duty of Court to Instruct

The defendant introduced testimony tending to show that "prior to the occasion in question" his reputation for "truth and veracity" in the community in which

he lived was good, and his counsel offered an instruction on the subject. This the court refused, and it did not give any on that phase of the case. Whether the court was of the opinion that the offered instruction was not good, or that defendant was not entitled to an instruction upon the subject, the record does not disclose. Upon the evidence introduced defendant was entitled upon his request to the benefit of a proper instruction upon the subject; subject to the provisions of this section, the court is required to instruct a jury upon all matters of law necessary for its information in rendering a verdict. *State v. Jackson*, 88 M 420, 435, 293 P 309.

Duty to Object and Point Out Error and to Except

Where defendant fails to make objection to any portion of the charge or to any action of the trial court in its settlement during trial, he will not, on appeal, be heard to complain of error therein, or of any omission by the court to submit any special instruction. *State v. Stone*, 40 M 88, 93, 105 P 89.

Paragraph 4 of this section, prohibiting reversal by the supreme court for error in instructions where such error was not specifically pointed out and excepted to at the settlement of the instructions, and the error and exception incorporated and settled in a bill of exceptions, is mandatory, and error in instructions cannot be considered on appeal in a criminal case where the record does not contain a bill of exceptions. *State v. Cook*, 42 M 329, 331, 112 P 537.

The defendant, in a criminal case, is bound by instructions to which he does not object. *State v. Crean*, 43 M 47, 60, 114 P 603.

Errors in instructions must be specifically pointed out at the time the instructions are settled and the exceptions presented in a bill of exceptions before they will be considered on appeal. *State v. Thomas*, 46 M 468, 128 P 588.

Under this section, to entitle appellant in a criminal action to a review of an instruction given, the record must disclose that at the time of settlement of the instructions he made suitable objections and reserved an exception thereto. *State v. Brodock*, 53 M 463, 164 P 658; *State v. Neidamier*, 98 M 124, 37 P 2d 670.

Under the provisions of this section, errors in the instructions are not ground for reversal on appeal unless the same were specifically pointed out and excepted to. *State v. Kahn*, 56 M 108, 120, 182 P 107.

An erroneous instruction, given without objection, became the law of the case, the

supreme court on appeal being precluded by this section from reversing a judgment for error in instructions not specifically pointed out and excepted to at the settlement of the instructions. *Hawley v. Richardson*, 60 M 118, 128, 198 P 450.

Where defendant, through his attorney, at the settlement of the instructions, stated that he had no objections to them, assignments based on alleged error in them cannot be considered on appeal. *State v. Chronopoulos*, 60 M 329, 330, 199 P 266; *State v. Evans*, 60 M 367, 374, 199 P 440.

Where a defect in an instruction given was not pointed out specifically by defendant at the settlement of the instructions, the supreme court on appeal may not, under this section, consider an objection not so pointed out. *State v. Bolton*, 65 M 74, 81, 212 P 504; *State v. Cassill et al.*, 71 M 274, 279, 229 P 716; *State v. Dougherty*, 71 M 265, 266, 229 P 735; *State v. Sawyer*, 71 M 269, 272, 229 P 734; *State v. Vallie*, 82 M 456, 268 P 493.

An objection made at the settlement of the instructions in a criminal case that a certain paragraph thereof "is not applicable to the facts of this case" is insufficient, under this section, to warrant review of alleged errors urged under the specification relating thereto. *State v. McClain et al.*, 76 M 351, 358, 246 P 956.

Held, that the provision of this section prohibiting the supreme court from reversing a judgment in a criminal cause for any error in instructions not specifically pointed out and excepted to at the settlement of instructions and incorporated and settled in the bill of exceptions, applies only to error in instructions given, and not to error allegedly committed in refusing to give offered instructions. *State v. Daw*, 99 M 232, 234, 43 P 2d 240; *State v. Heaston*, 109 M 303, 314, 97 P 2d 330.

Duty to Submit an Instruction if Desired

It is well settled in this state that, if a party is not satisfied with an instruction proposed to be given, he must submit an instruction which more fully covers the particular matter, or he cannot be heard to complain, unless the instruction given be inherently wrong. *Territory v. Hart*, 7 M 489, 505, 17 P 718; *Territory v. Manton*, 8 M 95, 109, 19 P 387; *State v. Broadbent*, 19 M 467, 473, 48 P 775; *State v. Gordon*, 35 M 458, 467, 90 P 173; *State v. Tracey*, 35 M 552, 555, 90 P 791; *State v. Powell*, 54 M 217, 221, 169 P 46.

Where the defendant failed to offer an instruction on circumstantial evidence, he is in no position to complain of the omission to instruct the jury on that point. *State v. Francis*, 58 M 659, 670, 194 P 304.

Where the testimony of a physician touching a physical examination of the complaining witness was admitted solely for the purpose of showing that sexual intercourse might have taken place, and for none other, failure of the defendant to offer an instruction on the subject of its limitation deprived him of the right to complain that such an instruction was not given. *State v. Richardson*, 63 M 322, 328, 207 P 124.

Error Cannot be Predicated on Instructions not Ruled on by the Court

Where the record in a criminal cause does not show that the court ruled, or was requested to rule, on defendant's requests for instructions, or his objections to those given, errors relating to them will not be considered on appeal, since error cannot be predicated on the mere silence of the court. *State v. McCarthy*, 36 M 226, 236, 92 P 521.

Instructions to be Considered as a Whole

In determining whether an instruction is erroneous the charge as a whole must be considered. *State v. Wong Sun*, 114 M 185, 198, 133 P 2d 761.

Requirement That Instructions be Written

Mere silence of the accused or his counsel is not equivalent to a consent to the giving of oral instructions. *State v. Fisher*, 23 M 540, 551, 59 P 919.

Id. A statute requiring written instructions in a criminal action is mandatory, and the violation thereof is reversible error.

Id. A charge is oral if not in writing at the time of its delivery, and read to the jury as written.

In the absence of waiver by the parties, it is imperative that all instructions be submitted to the jury in writing. *State v. Tudor*, 47 M 185, 131 P 632.

After the jury in a criminal case had retired to the jury-room it was brought back at its request for information relative to the punishment which might be imposed under the indeterminate sentence statute. The court in the presence of defendant and counsel orally explained the provisions of the law and advised the jury as to the form in which it might return a verdict under that law. Defendant's counsel did not make any objection. Held, that the explanations made were not instructions on the law of the case and that, therefore, prejudicial error was not committed in making them orally. *State v. Kennedy*, 82 M 165, 167, 266 P 386.

Signing of Instructions—Necessity for

Requested instructions are required to be signed merely for the purpose of identification, to be used by the court in making up its charge to the jury; it is an irregularity, but no reversible error, for the court to permit the name and official title of the county attorney to be placed on instructions requested by him and given to the jury. *State v. Martin*, 29 M 273, 278, 74 P 725.

Opening Statement

The provision of this section, requiring the county attorney to make an opening statement in a prosecution for crime, is merely directory. *State v. Hall*, 55 M 182, 185, 175 P 267.

Held, that where defendant, charged with burglary and three prior convictions, at the opening of the trial admitted the prior convictions, the court did not err in permitting knowledge of the prior convictions to go to the jury by allowing the county attorney to read the information charging such convictions, in overruling an objection to the question asked defendant on cross-examination as to the prior convictions, or in instructing the jury that if they found the defendant guilty of burglary they should then consider the matter of the former convictions, giving the provisions of the statute fixing punishment for that crime when aggravated by prior convictions of felonies, in view of the provisions of this section, requiring the county attorney to state the case and offer evidence in support of the prosecution, and the fact that without such knowledge the jury could not intelligently fix the punishment to fit the crime. *State v. O'Neill*, 76 M 526, 532, 535, 248 P 215.

The county attorney could properly in his opening statement to the jury advert to evidence the state intended to prove, and under this section, is required to do so, and is not required to state for what purpose he intends to produce certain evidence; hence the trial court did not err in denying a request of counsel for defendant requiring him to do so. *State v. Keays*, 97 M 404, 416, 34 P 2d 855.

Purpose

This section does not undertake to do more than prescribe an orderly procedure for the trial of criminal cases. *State v. Hall*, 55 M 182, 185, 175 P 267.

References

Cited or applied as section 2070, Penal Code, before amendment, in *State v. Gay*, 18 M 51, 62, 44 P 411; *State v. Lucey*, 24 M 295, 305, 61 P 994; as chapter 82, Laws of 1907, in *State v. McCarthy*, 36 M 226,

236, 92 P 521; as section 9271, Revised Codes, in *State v. Hall*, 45 M 498, 516, 125 P 639; *State v. Lewis*, 52 M 495, 501, 159 P 415; *State v. Smith*, 57 M 349, 188 P 644; *State v. Bess*, 60 M 558, 574, 199 P 426; *State v. DeTonancour*, 112 M 94, 100, 112 P 2d 1065.

94-7202. (11970) **When order of trial may be departed from.** When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court, the order prescribed in the last section may be departed from.

History: En. Sec. 2071, Pen. C. 1895; re-en. Sec. 9272, Rev. C. 1907; re-en. Sec. 11970, R. C. M. 1921. Cal. Pen. C. Sec. 1094.

Criminal Law—633 (1), 680 (1), 801, 804 (1-9).

23 C.J.S. Criminal Law §§ 961, 1045, 1299, 1301, 1302.

Generally, see 53 Am. Jur. 1, Trial.

References

Cited or applied as section 9272, Revised Codes, in *State v. Hall*, 55 M 182, 185, 175 P 267.

94-7203. (11971) **Defendant presumed innocent—reasonable doubt.** A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.

History: Ap. p. Sec. 186, p. 245, *Bannack Stat.*; re-en. Sec. 307, p. 237, *Cod. Stat.* 1871; re-en. Sec. 307, 3d Div. *Rev. Stat.* 1879; re-en. Sec. 308, 3d Div. *Comp. Stat.* 1887; en. Sec. 2072, Pen. C. 1895; re-en. Sec. 9273, Rev. C. 1907; re-en. Sec. 11971, R. C. M. 1921. Cal. Pen. C. Sec. 1096.

"Reasonable Doubt"—Instructions

While the court has frequently approved as correct and sufficient to meet all requirements the instruction taken from *Commonwealth v. Webster*, 5 Cush. (59 Mass.) 295, 320, 52 Am. Dec. 711, (*Territory v. McAndrews*, 3 M 158; *State v. Martin*, 29 M 273, 74 P 725; *State v. De Lea*, 36 M 531, 93 P 814), error was not committed in submitting the following instruction "the term reasonable doubt best defines itself. In a legal sense, however, a reasonable doubt is a doubt which has some reason for its basis; a doubt for which there exists in the minds of the jurors a reason, and not a doubt arising from mere caprice or groundless conjecture." (*Brantly*). *State v. Lewis*, 52 M 495, 502, 159 P 415.

Held, on appeal from a judgment of conviction of murder in the first degree, that the trial court in giving the definition of "reasonable doubt" in an instruction on the subject repeatedly approved by the supreme court, did not commit reversible error by prefacing it thus: "You are instructed that a doubt which a juror is allowed to retain in his mind and under the influence of which he should form a verdict of not guilty, must always be a reasonable one," and that the contention of appellant that the phrase in effect does away with the presumption of innocence

declared by this section, may not be sustained. *State v. Zorn*, 99 M 63, 65, 41 P 2d 513.

An instruction on "reasonable doubt" not strictly adhering to the one given by Chief Justice Shaw in *Commonwealth v. Webster*, 5 Cush. (59 Mass. Rep.) 295, 320, and generally followed by courts, but adding *inter alia* that the jury is "not at liberty to disbelieve as jurors if you believe as men; your oath imposes upon you no obligation to doubt where no doubt would exist if no oath had been administered," held not erroneous, the court being of opinion that decisions holding that the term "reasonable doubt" defines itself is the most logical of a large number of authorities reviewed. *State v. Wong Sun*, 114 M 185, 194, 133 P 2d 761; *State v. Curtiss*, 114 M 232, 242, 135 P 2d 361.

NOTE.—Due to the frequent citation to the instruction of Chief Justice Shaw on "reasonable doubt," found in *Commonwealth v. Webster*, 5 Cush. (59 Mass. Rep.) 295, 320, the noted passage is here printed for convenience. "Then, what is a reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in

favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a

moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether."

References

Cited or applied as section 2072, Penal Code, in *State v. Martin*, 29 M 273, 279, 74 P 725; *State v. Konon*, 84 M 255, 262, 274 P 1060; *State v. Keckonen*, 107 M 253, 263, 84 P 2d 341; *Grady v. City of Livingston et al.*, 115 M 47, 61, 141 P 2d 346.

Criminal Law 308, 561 (1).
22 C.J.S. Criminal Law § 581; 23 C.J.S. Criminal Law §§ 910-913.
20 Am. Jur. 218, Evidence, § 222.

94-7204. (11972) Reasonable doubt as to degree convicts only of lowest.

When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only.

History: Ap. p. Sec. 186, p. 245, Bannack Stat.; re-en. Sec. 307, p. 237, Cod. Stat. 1871; re-en. Sec. 308, 3d Div. Comp. Stat. 1887; en. Sec. 2073, Pen. C. 1895; re-en. Sec. 9274, Rev. C. 1907; re-en. Sec.

11972, R. C. M. 1921. Cal. Pen. C. Sec. 1097.

Criminal Law 571.
23 C.J.S. Criminal Law § 925.

94-7205. (11973) Separate trials. When two or more defendants are jointly charged with a felony, any defendant requiring it must be tried separately. In other cases the defendants jointly charged may be tried separately or jointly in the discretion of the court.

History: En. Sec. 301, p. 236, Cod. Stat. 1871; re-en. Sec. 301, 3d Div. Rev. Stat. 1879; re-en. Sec. 302, 3d Div. Comp. Stat. 1887; re-en. Sec. 2074, Pen. C. 1895; re-en. Sec. 9275, Rev. C. 1907; re-en. Sec. 11973, R. C. M. 1921. Cal. Pen. C. Sec. 1098.

References

Cited or applied as section 302, Third Division Compiled Statutes 1887, in *State v. Davis*, 13 M 384, 34 P 182.

Criminal Law 622 (1).
23 C.J.S. Criminal Law § 934.
53 Am. Jur. 65, §§ 56 et seq.

Right to severance where two or more persons are jointly accused. 70 ALR 1171.

Separate trial of persons jointly charged as habitual criminals under statute enhancing penalty for second or subsequent offense. 116 ALR 241.

94-7206. (11974) Discharging defendant that he may be a witness.

When two or more persons are included in the same charge, the court may, at any time, before the defendants have gone into their defense, on the application of the county attorney, direct any defendant to be discharged, that he may be a witness for the state.

History: En. Sec. 187, p. 245, Bannack Stat.; re-en. Sec. 308, p. 237, Cod. Stat. 1871; re-en. Sec. 308, 3d Div. Rev. Stat. 1879; re-en. Sec. 309, 3d Div. Comp. Stat. 1887; amd. Sec. 2075, Pen. C. 1895; re-en.

Sec. 9276, Rev. C. 1907; re-en. Sec. 11974, R. C. M. 1921. Cal. Pen. C. Sec. 1099.

Criminal Law 302 (2).
22 C.J.S. Criminal Law § 457.

94-7207. (11975) Same. When two or more persons are included in the same indictment or information, and the court is of the opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must order him to be discharged before the evidence is closed, that he may be a witness for his codefendant.

History: En. Sec. 187, p. 245, Bannack Stat.; re-en. Sec. 308, p. 237, Cod. Stat. 1871; re-en. Sec. 308, 3d Div. Rev. Stat. 1879; re-en. Sec. 309, 3d Div. Comp. Stat. 1887; en. Sec. 2076, Pen. C. 1895; re-en.

Sec. 9277, Rev. C. 1907; re-en. Sec. 11975, R. C. M. 1921. Cal. Pen. C. Sec. 1100.

Criminal LawⒸ302 (1).

22 C.J.S. Criminal Law §§ 458, 459, 461-463.

94-7208. (11976) Effect of such discharge. The order mentioned in the last two sections is an acquittal of the defendant discharged, and is a bar to another prosecution for the same offense.

History: En. Sec. 187, p. 245, Bannack Stat.; re-en. Sec. 308, p. 237, Cod. Stat. 1871; re-en. Sec. 308, 3d Div. Rev. Stat. 1879; re-en. Sec. 309, 3d Div. Comp. Stat. 1887; en. Sec. 2077, Pen. C. 1895; re-en.

Sec. 9278, Rev. C. 1907; re-en. Sec. 11976, R. C. M. 1921. Cal. Pen. C. Sec. 1101.

Criminal LawⒸ178.

22 C.J.S. Criminal Law §§ 254, 256, 257.

94-7209. (11977) Rules of evidence in civil actions applicable to criminal cases. The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code.

History: En. Sec. 2078, Pen. C. 1895; re-en. Sec. 9279, Rev. C. 1907; re-en. Sec. 11977, R. C. M. 1921. Cal. Pen. C. Sec. 1102.

Where alterations appeared in an alleged written confession of defendant charged with crime, it was incumbent upon the state, under section 93-1501-2, relating to writings offered in evidence as exhibits in civil cases but made applicable to criminal cases by this section, to account for them before it is admissible in evidence; in the instant case defendant testified that the writing was inaccurate. *State v. Crighton*, 97 M 387, 401, 34 P 2d 511.

Operation and Effect

Evidence of the act or declaration of a conspirator relating to the conspiracy may, after proof of the conspiracy, be given against his co-conspirator. *Territory v. Campbell*, 9 M 16, 20, 22 P 121; *State v. Byers*, 16 M 565, 567, 41 P 708; *Harrington v. B. & M. Co.*, 19 M 411, 419, 48 P 758; *Pincus v. Reynolds*, 19 M 564, 569, 49 P 145; *State v. Dotson*, 26 M 305, 309, 67 P 938; *Lane v. Bailey*, 29 M 548, 557, 75 P 191.

Where a defendant in a criminal cause becomes a witness in his own behalf he is subject to the same rules of cross-examination and impeachment as any other witness; hence a question whether he had not suffered the previous convictions charged in the information was proper. *State v. O'Neill*, 76 M 526, 535, 248 P 215.

References

Cited or applied as section 2078, Penal Code, in *State v. O'Brien*, 18 M 1, 9, 43 P 1091, 44 P 399; *State v. Schnepel*, 23 M 523, 526, 59 P 927; *State v. Dotson*, 26 M 305, 309, 67 P 938; as section 9279, Revised Codes, in *State v. Hall*, 55 M 182, 184, 175 P 267; *State v. Hopkins*, 68 M 504, 509, 219 P 1106.

Criminal LawⒸ304 (1) et seq.

26 C.J.S. Criminal Law §§ 531, 533, 534, 565.

See generally, 20 Am. Jur. 1, Evidence.

94-7210. (11978) Evidence on trial for treason. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open court; nor can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

History: Ap. p. Sec. 169, p. 243, Bannack Stat.; re-en. Sec. 294, p. 235, Cod. Stat. 1871; re-en. Sec. 294, 3d Div. Rev. Stat. 1879; re-en. Sec. 295, 3d Div. Comp. Stat. 1887; en. Sec. 2079, Pen. C. 1895; re-en. Sec. 9280, Rev. C. 1907; re-en. Sec.

11978, R. C. M. 1921. Cal. Pen. C. Sec. 1103.

TreasonⒸ12, 13.

63 C.J. Treason §§ 19, 23.

52 Am. Jur. 802, Treason, §§ 16, 17.

94-7211. (11979) Evidence on trial for conspiracy. Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense,

the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved; but other overt acts not alleged may be given in evidence.

History: En. Sec. 170, p. 243, Bannack Stat.; re-en. Sec. 295, p. 235, Cod. Stat. 1871; re-en. Sec. 295, 3d Div. Rev. Stat. 1879; re-en. Sec. 296, 3d Div. Comp. Stat. 1887; amd. Sec. 2080, Pen. C. 1895; re-en.

Sec. 9281, Rev. C. 1907; re-en. Sec. 11979, R. C. M. 1921. Cal. Pen. C. Sec. 1104.

Conspiracy—43 (5), 46.

15 C.J.S. Conspiracy §§ 88, 92.

11 Am. Jur. 568, Conspiracy, §§ 37-43.

94-7212. (11980) When burden of proof shifts in trial for murder. Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

History: En. Sec. 33, p. 182, Bannack Stat.; re-en. Sec. 40, p. 276, Cod. Stat. 1871; re-en. Sec. 40, 4th Div. Rev. Stat. 1879; re-en. Sec. 40, 4th Div. Comp. Stat. 1887; amd. Sec. 2081, Pen. C. 1895; re-en. Sec. 9282, Rev. C. 1907; re-en. Sec. 11980, R. C. M. 1921. Cal. Pen. C. Sec. 1105.

Cross-Reference

Fact of killing to be proved, sec. 94-2510.

Extent of Proof for Matters of Justification

In cases of homicide it is error to charge the jury that the matters of justification, excuse or mitigation should be proved beyond all reasonable doubt. Territory v. Edmonson, 4 M 141, 1 P 738.

Upon the conclusion of the state's case, where no evidence of insanity has been introduced, the burden devolves upon the defendant to produce some proof of his insanity, and when he has introduced sufficient to raise a reasonable doubt as to his sanity, he is entitled to an acquittal, unless such evidence is successfully rebutted by the state. State v. Peel, 23 M 358, 374, 59 P 169.

An instruction defining the term "preponderance of the evidence" has no place in a criminal trial. Under this section, no greater burden rests upon the defendant than to introduce sufficient evidence to raise a reasonable doubt as to the existence of such so-called affirmative defenses as alibi, insanity, and justification. State v. Felker, 27 M 451, 461, 71 P 668.

Where the evidence on the part of the prosecution, in a case of homicide, tends to show that the killing amounted to murder, the burden is upon the defendant to prove circumstances of mitigation, or that justified or excused the killing; but, concerning the quantum of proof, if he raises a reasonable doubt of his guilt, he should be acquitted. State v. Crean, 43 M 47, 55, 114 P 603.

Where the proof of the prosecution, that is, the effect of all the evidence introduced by it, makes out the defense upon which one charged with crime relies, by raising a reasonable doubt of his guilt, defendant may, under this section, avail himself of such defense without proof on his part. State v. Powell, 54 M 217, 220, 169 P 46.

Although the defendant, in a prosecution for homicide, may avail himself of an affirmative defense established by evidence for the prosecution, it is error to instruct the jury that if any proof offered by the state tends to show that the defendant was "excused or justified" in the killing, then they must acquit him. State v. Powell, 54 M 217, 220, 169 P 46.

Operation and Effect

The state having proved the killing by the defendant without evidence tending to show that the act amounts to manslaughter, or that the defendant is justifiable or excusable, the crime is presumed to be murder of the second degree. If the state would raise the crime to murder of the first degree, the burden is upon it to prove deliberation; on the other hand, if the defendant would reduce the crime to manslaughter, there must be produced evidence sufficient to create a reasonable doubt of the existence of malice. State v. Fisher, 23 M 540, 546, 59 P 919; State v. Kuun, 55 M 436, 446, 178 P 288.

In a prosecution for murder, the burden of proving circumstances of mitigation or justification is on the defendant. State v. Byrd, 41 M 585, 596, 111 P 407.

In a prosecution for murder, the duty of showing excuse or palliating circumstances, or of adducing evidence of facts sufficient to raise in the minds of the jurors a reasonable doubt of the defendant's guilt, is upon the accused. State v. Leakey, 44 M 354, 366, 120 P 234. See also State v. Sheldon, 54 M 185, 192, 169 P 37.

Appellant, who was charged with homicide, was in no position to complain of an instruction which by failing to give the rule embodied in this section, to the effect that the burden of proving circumstances of mitigation, justification, or excuse devolves upon defendant, impliedly told the jury that the burden did not rest upon him at any stage of the case. *State v. Halk*, 49 M 173, 175, 141 P 149.

Id. While this section declares the circumstances under which the burden of proof shifts to the defendant, he is not at any time required to bear a greater burden than to go forward with his proofs far enough to create in the minds of the jurors a reasonable doubt as to his guilt. The burden of proof, as these words are used in the criminal law, is never upon the defendant to disprove the facts necessary to establish the crime with which he is charged. It is upon the state from the beginning to the end of the trial.

Under this section, the accused, in a prosecution for murder, must, where he relies upon self-defense, after proof that a homicide was committed by him, assume the burden of furnishing sufficient evidence to raise a reasonable doubt of his guilt. *State v. Powell*, 54 M 217, 220, 169 P 46.

When a homicide is established, nothing else appearing, the presumption of innocence is overcome, and the presumption establishing malicious intent comes to the aid of the prosecution. *State v. Colbert*, 58 M 584, 591, 194 P 145.

Id. Where this section is given as an instruction, it is not error to omit therefrom the last clause commencing with the word "unless," when the evidence of the prosecution contains nothing tending to mitigate, justify or excuse the homicide,

the effect of such instruction being to make it imperative upon the defense to introduce such evidence.

The contention of defendant that since no one was present when the shot which killed deceased was fired, the court erred in giving an instruction in the words of this section, heretofore construed to mean that if the jury should find the fact that defendant did the killing, the burden of proving circumstances mitigating the offense from murder to manslaughter or justifying it devolves upon him, unless the evidence which proves the killing by the defendant also shows that it was manslaughter or justifiable, held without merit. *State v. Davis*, 60 M 426, 440, 199 P 421.

In a prosecution for murder, where the fact that defendant killed deceased was established, and there were no circumstances tending to justify or excuse the act, it was not error to instruct, in the language of this section, that, the commission of the homicide being proved, the burden of proving circumstances of mitigation, justification, or excuse devolved on defendant, unless the state's proof showed the crime amounted only to manslaughter, or that defendant was justifiable or excusable. *State v. Bess*, 60 M 558, 575, 199 P 426.

References

Cited or applied as section 2081, Penal Code, in *State v. Fisher*, 23 M 540, 546, 59 P 919; as section 9282, Revised Codes, in *State v. Inich*, 55 M 1, 15, 173 P 230; *State v. Lewis*, 67 M 447, 453, 216 P 337; *State v. Chavez*, 85 M 544, 550, 281 P 352.

Homicide—151 (1).

40 C.J.S. Homicide §§ 196, 197.

94-7213. (11981) All witnesses need not be called. Upon a trial for murder or manslaughter it is not necessary for the state to call as witnesses all persons who are shown to have been present at the homicide, but the court may require all of such witnesses to be sworn and examined.

History: En. Sec. 2082, Pen. C. 1895; re-en. Sec. 9283, Rev. C. 1907; re-en. Sec. 11981, R. C. M. 1921.

Operation and Effect

Under this section it is discretionary with the court whether all witnesses present at a homicide should be sworn and examined, and it is only where the refusal to order such witnesses to be placed on the stand constitutes an abuse of discretion that reversible error is committed. *State v. Rolla*, 21 M 582, 55 P 523.

It is discretionary with the trial court whether all persons who are shown to have been present at a homicide shall be sworn and examined in behalf of the state,

and exercise of its discretion will be corrected only in case of abuse. *State v. Tighe*, 27 M 327, 336, 71 P 3.

Refusal of the court to require the state to call and examine an eye-witness to the crime whose name was indorsed on the information was proper. *State v. Inich*, 55 M 1, 13, 173 P 230.

References

Cited or applied as section 9283, Revised Codes, in *State v. Vandervoort*, 57 M 540, 545, 189 P 764.

Homicide—266.

41 C.J.S. Homicide § 337.

94-7214. (11982) Evidence on a trial for bigamy. Upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the same may be proved by such evidence as is admissible to prove a marriage in other cases; and when the second marriage took place out of this state, proof of that fact, accompanied with proof of cohabitation thereafter in this state, is sufficient to sustain the charge.

History: Ap. p. Sec. 140, p. 302, Cod. Stat. 1871; re-en. Sec. 140, 4th Div. Rev. Stat. 1879; re-en. Sec. 155, 4th Div. Comp. Stat. 1887; amd. Sec. 2083, Pen. C. 1895; re-en. Sec. 9284, Rev. C. 1907; re-en. Sec.

11982, R. C. M. 1921. Cal. Pen. C. Sec. 1106.

Bigamy↔9, 10.

10 C.J.S. Bigamy §§ 18, 20.

7 Am. Jur. 767, Bigamy, §§ 32 et seq.

94-7215. (11983) Evidence upon a trial for forging bank bills, etc. Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company or bank, or for passing, or attempting to pass, or having in possession with intent to pass, any such forged bill, or note, it is not necessary to prove the incorporation of such bank or company by the charter or act of incorporation, but it may be proved by general reputation, and persons of skill are competent witnesses to prove that such bill or note is forged or counterfeited.

History: En. Secs. 96, 97, p. 290, Cod. Stat. 1871; re-en. Secs. 96, 97, 4th Div. Rev. Stat. 1879; re-en. Secs. 104, 105, 4th Div. Comp. Stat. 1887; re-en. Sec. 2084, Pen. C. 1895; re-en. Sec. 9285, Rev. C. 1907; re-en. Sec. 11983, R. C. M. 1921. Cal. Pen. C. Sec. 1107.

Criminal Law↔400 (6), 478 (1).

22 C.J.S. Criminal Law § 695; 23 C.J.S.

Criminal Law § 858.

23 Am. Jur. 701, Forgery, §§ 56 et seq.

94-7216. (11984) Evidence upon trial for abortion and seduction. Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of twenty-five years, for the purpose of prostitution, or aiding or assisting therein, the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence.

History: En. Sec. 2085, Pen. C. 1895; re-en. Sec. 9286, Rev. C. 1907; re-en. Sec. 11984, R. C. M. 1921. Cal. Pen. C. Sec. 1108.

Abortion↔11; Prostitution↔4.

1 C.J.S. Abortion §§ 31-35; 50 C.J. Prostitution § 36.

1 Am. Jur. 143, Abortion, §§ 34 et seq.;

47 Am. Jur. 647, Seduction, §§ 37 et seq.

94-7217. (11985) Proof of corporation by reputation. If upon a trial or proceeding in a criminal case, the existence, constitution, or powers of any corporation shall become material, or be in any way drawn in question, it is not necessary to produce a certified copy of the articles or act of incorporation, but the same may be proved by general reputation, or by the printed statutes of the state, or government or country by which such corporation was created.

History: En. Sec. 172, p. 243, Bannack Stat.; re-en. Sec. 297, p. 235, Cod. Stat. 1871; re-en. Sec. 297, 3d Div. Rev. Stat. 1879; re-en. Sec. 298, 3d Div. Comp. Stat. 1887; re-en. Sec. 2086, Pen. C. 1895; re-en.

Sec. 9287, Rev. C. 1907; re-en. Sec. 11985, R. C. M. 1921.

Criminal Law↔400 (6).

22 C.J.S. Criminal Law § 695.

94-7218. (11986) Evidence on a trial for selling, etc., lottery tickets.

Upon a trial for the violation of any of the provisions of sections 94-3001 to 94-3011, it is not necessary to prove the existence of any lottery in which any lottery ticket purports to have been issued, or to prove the actual signing of any such ticket, or share, or pretended ticket or share, of any pretended lottery, nor that any lottery ticket, share or interest was signed or issued by the authority of any manager, or of any person assuming to have authority as manager; but in all cases proof of the sale, furnishing, bartering, or procuring of any ticket, share, or interest therein, or of any instrument purporting to be a ticket, or part or share of any such ticket, is evidence that such share or interest was signed and issued according to the purport thereof.

History: En. Sec. 2087, Pen. C. 1895;
re-en. Sec. 9288, Rev. C. 1907; re-en. Sec.
11986, R. C. M. 1921. Cal. Pen. C. Sec.
1109.

Lotteries—29.
38 C.J. Lotteries § 64.
34 Am. Jur. 671, Lottery, § 31.

94-7219. (11987) Evidence of false pretenses.

Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any money, personal property, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof, be in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by testimony of two witnesses or that of one witness and corroborating circumstances; but this section shall not apply to a prosecution for falsely representing or personating another, and, in such assumed character, marrying or receiving any money or property.

History: En. Sec. 2088, Pen. C. 1895;
re-en. Sec. 9289, Rev. C. 1907; amd. Sec.
1, Ch. 8, L. 1917; re-en. Sec. 11987, R. C.
M. 1921. Cal. Pen. C. Sec. 1110.

Id. In the absence of evidence that the complaining witness parted with money in reliance on one of several alleged false representations, conviction was not justified on that count of the information.

Operation and Effect

Held, under this section, that where defendant was charged with obtaining money by a false pretense that he had credit at a certain bank and could borrow the money there, testified to by one witness only, there was a total failure of proof, in the absence of any false token or writing employed by the defendant or corroborating circumstances. *State v. Brantingham*, 66 M 1, 13, 212 P 499.

References

State v. Foot, 100 M 33, 45, 48 P 2d 1113.

False Pretenses—49 (1).

35 C.J.S. False Pretenses § 52.

22 Am. Jur. 501, False Pretenses and Allied Criminal Fraud, §§ 101 et seq.

94-7220. (11988) Conviction on testimony of accomplice.

A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof.

History: Ap. p. Sec. 316, p. 238, Cod. Stat. 1871; re-en. Sec. 316, 3d Div. Rev. Stat. 1879; re-en. Sec. 317, 3d Div. Comp. Stat. 1887; en. Sec. 2089, Pen. C. 1895;

re-en. Sec. 9290, Rev. C. 1907; re-en. Sec. 11988, R. C. M. 1921. Cal. Pen. C. Sec. 1111.

Corroboration of Testimony of Accomplice Question for Court

Whether evidence corroborative of the testimony of an accomplice tends to connect defendant with the commission of the offense charged against him, within the meaning of this section, is a question of law for the court, but the weight of it is a matter for the consideration of the jury. *State v. Yegen*, 86 M 251, 254, 283 P 210.

Where the state relies on the testimony of an accomplice to convict one of crime, the question whether the evidence in corroboration of that given by the accomplice meets the requirement of this section, that it must in itself, without the aid of the testimony of the accomplice, tend to connect the defendant with the commission of the offense charged, is one of law for the court. *State v. Jones*, 95 M 317, 323, 26 P 2d 341.

One Accomplice Cannot Corroborate Another

One accomplice cannot supply the independent evidence necessary to corroborate another accomplice. *State v. Bolton*, 65 M 74, 85, 88, 212 P 504.

Operation and Effect

This section does not, unless by implication, require the production of evidence from independent sources with respect to the corpus delicti, the identity of the person killed or any other particular. *State v. Calder*, 23 M 504, 513, 59 P 903; *State v. Stevenson*, 26 M 332, 335, 67 P 1001.

In a larceny case, the testimony of an accomplice will not support a conviction unless corroborative. *State v. McCarthy*, 36 M 226, 235, 92 P 521.

Refusal of an offered instruction that a defendant could not be convicted upon the uncorroborated evidence of an accomplice unaccompanied by one as to what corroboration would take the case out of the rule or one defining what constitutes an accomplice, held not prejudicial error under the case as made. *State v. Smith*, 75 M 22, 27, 241 P 522.

The requirement of this section that the testimony of an accomplice must be corroborated by other evidence does not call for corroboration as to every fact to which the accomplice testifies or for evidence sufficient of itself to establish defendant's guilt. If, unaided by that of the accomplice, it tends to connect defendant with the commission of the crime it is sufficient; it need not be direct but may be circumstantial, and in determining its sufficiency all of the evidence, other than that of the accomplice, is to be considered, including that of defendant. *State v. Broell*, 87 M 284, 288, 294, 286 P 1108.

Sufficiency of Corroborative Evidence

Evidence held to be insufficient corroboration of an accomplice's testimony that he and accused, having been discovered stealing a cow by a white man, followed him, and killed him and his dog, placing the two bodies together, where the only identification of the locality is that it was on the same stream, the country being unsettled cattle country. *State v. Spotted Hawk*, 22 M 33, 57, 55 P 1026.

The corroboration of the testimony of an accomplice must be evidence from an independent source, and it must be such that this independent evidence in itself, without considering the testimony of the accomplice at all, tends to connect the defendant with the commission of the crime charged. It is not a satisfaction of the statute to corroborate an accomplice upon immaterial matters, nor to prove merely that the crime charged has been committed, or the circumstances under which it has been committed. *State v. Geddes*, 22 M 68, 83, 55 P 919; *State v. Lawson*, 44 M 488, 490, 120 P 808. See also *State v. Stevenson*, 26 M 332, 334, 67 P 1001.

It is not necessary that the evidence in corroboration of the accomplice must be of sufficient strength, when standing alone, to connect the defendant with the commission of the crime, or to establish his guilt; if it tends in and of itself alone to prove the defendant's connection, it is sufficient. *State v. Calder*, 23 M 504, 520, 59 P 903.

Corroborating evidence tending to establish, independently of the accomplice's statements, the commission of the offense and accused's connection therewith, is sufficient, though, if the accomplice's testimony was not considered, the corroborating evidence would be insufficient to convict. *State v. Stevenson*, 26 M 332, 334, 67 P 1001.

The testimony of an accomplice is sufficiently corroborated, where the evidence, independent of the testimony of the accomplice, has sufficient probative value to justify a submission to the jury for a finding as to the guilt of accused. *State v. Biggs*, 45 M 400, 406, 123 P 410.

It is not necessary that an accomplice should be corroborated upon every fact to which he testifies; nor is it necessary that the independent evidence should be sufficient of itself to establish defendant's guilt, or to connect him with the commission of the crime charged, but it is sufficient if it tends to do so. *State v. Slotower*, 56 M 230, 233, 182 P 270.

Id. Evidence held sufficient to establish corroboration within the meaning of this section.

To render evidence corroborative of that given by an accomplice sufficient to war-

rant conviction, the accomplice need not be corroborated upon every fact to which he testified, or that the independent evidence alone should be sufficient to bring about that result, or that it connects defendant with the commission of the offense, it being sufficient, if, unaided by that of the accomplice, it tends to connect with its perpetration. *State v. Bolton*, 65 M 74, 85, 212 P 504.

An accomplice need not be corroborated as to every material fact to which he testifies, nor is it necessary that the corroborative testimony be sufficient to make a prima facie case against the defendant. *State v. Ritz*, 65 M 180, 186, 211 P 298.

Id. Evidence corroborative of that given by an accomplice need not be direct, but may be circumstantial, the statute (this section) being satisfied if the independent evidence tends to connect the accused with the commission of the crime of which he is charged.

The corroborating evidence without which a defendant cannot be convicted on the testimony of an accomplice, under this section, may be supplied by the defendant or his witnesses; may be circumstantial; need not extend to every fact to which the accomplice testifies; need not be sufficient to justify a conviction or to establish a prima facie case of guilt, or to connect the defendant with the commission of the crime; it being sufficient if it tends to do so, and whether it tends to do so is a question of law, the weight of the evidence—its efficacy to fortify the testimony of the accomplice and render his story trustworthy—being a matter for the consideration of the jury. *State v. Cobb*, 76 M 89, 91, 245 P 265.

Id. Evidence in a prosecution for the larceny of horses, corroborative of the testimony of two accomplices, examined and held sufficient as tending to connect defendant with the commission of the offense, and therefore sufficient to sustain his conviction under this section.

To warrant conviction for crime on the testimony of an accomplice, within the rule established by this section, it is not necessary that he be corroborated as to every material fact to which he testifies, or that the corroborative evidence in itself be sufficient to establish a prima facie case or to justify conviction or connect defendant with the commission of the offense charged, but if it tends to connect him therewith it is sufficient; such evidence need not be direct but may be circumstantial; it may be supplied by the defendant or his witnesses. *State v. Yegen*, 86 M 251, 254, 283 P 210.

Id. Evidence in a prosecution for the larceny of a horse in which the state relied largely upon the testimony of an admitted accomplice, examined and held suffi-

ciently corroborative as tending to connect the accused with the commission of the offense, independently of the testimony of the accomplice.

The fact that defendant, charged with the larceny of livestock, had possession of and exercised dominion over the animals, to the extent of selling and receiving payment for them, unexplained and considered in the light of the surrounding circumstances, tended to connect him with the crime charged, under the above accomplice rule, regardless of whether or not the circumstances were sufficient, coupled with his possession and dominion, to warrant a conviction on a charge of larceny or of receiving stolen property. *State v. Broell*, 87 M 284, 288, 294, 286 P 1108.

In a prosecution for larceny of livestock in which appellant's convicted co-defendant was one of the state's witnesses, evidence corroborative of that of the accomplice held sufficient to satisfy the requirements of this section, relative to corroboration. *State v. Ingersoll*, 88 M 126, 292 P 250.

Evidence corroborative of that of an accomplice in a prosecution for grand larceny, to the effect that defendant near midnight carried the accomplice and one other in her car to a ranch where the latter two alighted, went to a barn, took four saddles, placed them in the back part of the car which defendant then drove to a place where the property was hidden—examined and held sufficient to meet the requirements of this section. *State v. McComas*, 89 M 187, 295 P 1011.

All the testimony adduced at a criminal trial, excluding that of the accomplice but including that of defendant, must be considered in determining the sufficiency of testimony said to corroborate that of the accomplice, except that where there are two or more accomplices no statement of one can supply corroboration for another. *State v. Jones*, 95 M 317, 323, 26 P 2d 341.

Id. The independent evidence required by this section for corroboration of that given by an accomplice need not be direct; it may be in whole or in part circumstantial.

Id. The law does not require that an accomplice be corroborated upon every fact testified to by him, or that the independent evidence mentioned in this section be sufficient to justify a conviction or connect defendant with the commission of the offense for which he is on trial; if it tends to connect him therewith or is such that culpability on defendant's part may be deduced therefrom, it is sufficient.

Id. Evidence in corroboration of that given by an accomplice which merely shows an opportunity on the part of defendant of having joined in the commis-

sion of an offense is insufficient, and where the facts and circumstances relied upon for corroboration are as consistent with innocence as with guilt, conviction on such evidence cannot stand.

Id. Evidence in a prosecution for robbery against one of three defendants, one of whom pleaded guilty, the second being convicted on a separate trial and upon whose testimony the state relied for conviction of appellant, reviewed, and held insufficient as corroborating that given by the accomplice, it showing no more than an opportunity on the part of defendant to have conspired to commit the crime and a suspicion that he did so, and having been as consistent with his innocence as with guilt.

Under this section the accomplice need not be corroborated upon every fact to which he testified nor need the corroborating evidence be sufficient standing alone, to convict or absolutely connect the defendant with the crime, it being sufficient if the corroborative evidence tends to connect him with its perpetration. *State v. Akers*, 106 M 43, 51, 74 P 2d 1138.

Evidence in a prosecution for attempted arson against the owner of a dwelling house, who, according to accomplice's testimony, solicited him upon the promise to pay him ten per cent of the insurance money and furnished him with a diagram of the upper story where the attempt was made, the lower story being occupied, held sufficiently corroborated by other evidence tending to connect the defendant with commission of the crime under this section to warrant judgment of conviction. *State v. Gaffney*, 106 M 310, 313, 77 P 2d 398.

Testimony in a prosecution for the infamous crime against nature (sodomy) claimed sufficiently corroborative of that of a boy accomplice in that it tended to connect the defendant with the commission of the offense, held insufficient as simply showing opportunity, suspicion, or that he and the boy were together in same room when arrested, or that he had made gifts to the boy, or the boy's nervous condition, etc., and therefore insufficient to warrant conviction. *State v. Keekonen*, 107 M 253, 261, 84 P 2d 341.

"Tends to Connect"

To meet the requirement of this section that the testimony of an accomplice must tend to connect with the commission of the offense charged, testimony upon immaterial matters or such as raises a suspicion or conjecture is insufficient, but it must have a tendency to establish the state's case and not be equally consonant with a reasonable explanation pointing to innocent conduct on the part of defendant.

State v. Keekonen, 107 M 253, 260, 84 P 2d 341.

Who Is an Accomplice

A person through whom a litigant attempted to corruptly influence a member of a jury panel, and who, while declining to act as intermediary, stated that he would not say anything to anybody, but that he would have to tell the prospective trial juror, with whom he was connected in a business way, so as to put him on his guard, was not an accomplice whose testimony it was necessary to corroborate before the litigant could be found guilty of contempt. *State ex rel. Webb v. District Court*, 37 M 191, 199, 95 P 593.

To constitute a witness in a prosecution for larceny an accomplice, within the meaning of this section, he must have entertained a criminal intent common with that which moved the defendant to commit the crime with which he stood charged, or, not having been present at its commission, must have advised and encouraged it, and whether he did either was a question for the jury under appropriate instructions. *State v. Slothower*, 56 M 230, 232, 182 P 270.

The question whether a witness for the state is an accomplice of the defendant is, unless the fact is undisputed, for the jury under proper instructions, and where the evidence as to this fact or as to corroboration is doubtful or conflicting, the court should not invade its province by instructions. *State v. Smith*, 75 M 22, 27, 241 P 522.

To constitute a witness for the state an accomplice, he must have entertained a criminal intent common with that which moved the defendant to commit the crime with which he stands charged, or, not having been present at its commission, must have advised and encouraged it. *State v. Keithley*, 83 M 177, 181, 271 P 452.

Id. If a witness for the state whose testimony is relied upon by it to convict the defendant on trial for crime could himself have been informed against for the offense, either as a principal, strictly speaking, or as accessory before the fact and as such made a principal by section 94-204, he is an accomplice whose uncorroborated testimony is insufficient to sustain conviction.

To constitute a witness an accomplice he must have been guilty of complicity in the crime charged, either by being present and aiding in and abetting it, or by having advised and encouraged its commission, though absent at the time; he must have knowingly, voluntarily and with common intent with the principal offender united in the commission of the crime, and the

test whether or not he is an accomplice is: Would the facts justify his prosecution with the defendant on trial? *State v. McComas et al.*, 85 M 428, 433, 278 P 993.

As against the contention of defendant dealer, in a prosecution for receiving stolen property, that the thief was his accomplice and that therefore, under this section, his testimony required corroboration, held, not meritorious, since the theft was committed before the thief solicited the receiver to buy the cigarettes, and the defendant was not shown to have had any knowledge of the fact that the theft was to be committed. In general, the larcener is not the accomplice of the one who know-

ingly receives stolen property. *State v. Mercer*, 114 M 142, 155, 133 P 2d 358.

References

Cited or applied as section 2089, Penal Code, in *State v. Allen*, 34 M 403, 407, 87 P 177; as section 9290, Revised Codes, in *State v. Wakely*, 43 M 427, 438, 117 P 95; *State v. Van*, 44 M 374, 120 P 479; *State v. Ritz*, 67 M 511, 513, 216 P 566; *State v. Curtiss*, 114 M 232, 240, 135 P 2d 361.

Criminal Law 510, 511 (2).

22 C.J.S. Criminal Law §§ 810, 812, 815.

20 Am. Jur. 1087, Evidence, §§ 1235-1241.

94-7221. (11989) Mistake in indictment or information. When it appears, at any time before verdict or judgment, that a mistake has been made in charging the proper offense, the defendant must not be discharged, if there appears good cause to detain him in custody; but the court must commit him, or require him to give bail for his appearance to answer to the offense; and may also require the witnesses to give bail for their appearance.

History: En. Sec. 188, p. 246, Bannack Stat.; re-en. Sec. 309, p. 237, Cod. Stat. 1871; re-en. Sec. 309, 3d Div. Rev. Stat. 1879; re-en. Sec. 310, 3d Div. Comp. Stat. 1887; amd. Sec. 2090, Pen. C. 1895; re-en.

Sec. 9291, Rev. C. 1907; re-en. Sec. 11989, R. C. M. 1921.

Criminal Law 302 (1).

22 C.J.S. Criminal Law §§ 458, 459, 461-463.

94-7222. (11990) Discharge of jury for lack of jurisdiction, etc. The court may direct the jury to be discharged where it appears that it has not jurisdiction of the offense, or that the facts charged do not constitute an offense punishable by law.

History: En. Sec. 317, p. 238, Cod. Stat. 1871; re-en. Sec. 317, 3d Div. Rev. Stat. 1879; re-en. Sec. 318, 3d Div. Comp. Stat. 1887; re-en. Sec. 2091, Pen. C. 1895; re-en. Sec. 9292, Rev. C. 1907; re-en. Sec. 11990, R. C. M. 1921. Cal. Pen. C. Sec. 1113.

case, if the opening statement of the county attorney discloses affirmatively that the offense charged was committed outside of the county in which the prosecution is being had. *State v. Hall*, 55 M 182, 185, 175 P 267.

Operation and Effect

The court has express statutory authority to discharge the jury, in a criminal

Criminal Law 867.

23 C.J.S. Criminal Law §§ 1383-1385.

53 Am. Jur. 681, Trial, §§ 970 et seq.

94-7223. (11991) Proceedings, if jury discharged for want of jurisdiction of offense committed out of the state. If the jury be discharged because the court has not jurisdiction of the offense charged, and it appear that it was committed out of the jurisdiction of this state, the defendant must be discharged.

History: En. Sec. 2092, Pen. C. 1895; re-en. Sec. 9293, Rev. C. 1907; re-en. Sec. 11991, R. C. M. 1921. Cal. Pen. C. Sec. 1114.

References

State v. Peck, 83 M 327, 332, 271 P 707.

94-7224. (11992) Proceedings in such case when offense committed in the state. If the offense was committed within the jurisdiction of another county of this state, the court may direct the defendant to be committed for such time as it deems reasonable, to await a warrant from the proper

county for his arrest; or if the offense is a misdemeanor only, it may admit him to bail in an undertaking, with sufficient sureties, that he will, within such time as the court may appoint, render himself amenable to a warrant for his arrest from the proper county; and, if not sooner arrested thereon, will attend at the office of the sheriff of the county where the trial was had, at a certain time particularly specified in the undertaking to surrender himself upon the warrant, if issued, or that his bail will forfeit such sum as the court may fix, to be mentioned in the undertaking; and the clerk must forthwith transmit a certified copy of the indictment or information, and of all the papers filed in the action, to the county attorney of the proper county, the expense of which transmission is chargeable to that county.

History: En. Sec. 2093, Pen. C. 1895; 11992, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9294, Rev. C. 1907; re-en. Sec. 1115.

94-7225. (11993) Same. If the defendant is not arrested on a warrant from the proper county, as provided in the next preceding section, he must be discharged from custody or his bail in the action is exonerated, or money deposited instead of bail must be refunded as the case may be, and the sureties in the undertaking, as mentioned in that section, must be discharged. If he is arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant of arrest issued by a magistrate.

History: En. Sec. 2094, Pen. C. 1895; re-en. Sec. 9295, Rev. C. 1907; re-en. Sec. 11993, R. C. M. 1921. Cal. Pen. C. Sec. 1116. Bail—73, 74 (1); Criminal Law—302 (1). 8 C.J.S. Bail §§ 52, 53, 76; 22 C.J.S. Criminal Law §§ 458, 459, 461-463.

94-7226. (11994) Proceedings, if jury discharged because the facts do not constitute an offense. If the jury be discharged because the facts as charged do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged; or if admitted to bail, that his bail be exonerated; or if he has deposited money instead of bail, that the money be refunded to him, unless in its opinion a new indictment or information can be framed, upon which the defendant can be legally convicted, in which case it may direct the county attorney to file a new information, or (if the defendant has not been committed by a magistrate) direct that the case be submitted to the same or another grand jury; and the same proceedings must be had thereon as are prescribed in section 94-6604.

History: En. Sec. 2095, Pen. C. 1895; re-en. Sec. 9296, Rev. C. 1907; re-en. Sec. 11994, R. C. M. 1921. Cal. Pen. C. Sec. 1117. Bail—73, 74 (1); Criminal Law—302 (1); Indictment and Information—16. 8 C.J.S. Bail §§ 52, 53, 76; 22 C.J.S. Criminal Law §§ 458, 459, 461-463; 42 C.J.S. Indictments and Information §§ 25, 26.

94-7227. (11995) When evidence on either side is closed, court may advise jury to acquit. If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant; but the jury is not bound by the advice.

History: En. Sec. 2096, Pen. C. 1895; re-en. Sec. 9297, Rev. C. 1907; re-en. Sec. 11995, R. C. M. 1921. Cal. Pen. C. Sec. 1118. **Appeal From** Subdivision 5 of section 94-8104, provides that the state may appeal in a criminal case inter alia, from an order

directing the jury to find for the defendant. At the close of the testimony in such a case the court ordered defendant discharged on the ground of failure of proof, the state appealing from the order. Held, under the rule of strict construction, that the order may not be held appealable as one "in effect" directing the jury to find for defendant and, such an order not being enumerated in section 94-8104, as one from which the state may appeal, the appeal will on defendant's motion be dismissed. *State v. Peck*, 83 M 327, 331, 271 P 707.

Motion for Nonsuit not Proper Practice

In a criminal cases motions for nonsuit are not proper to raise the question of the sufficiency of the evidence to warrant conviction, the proper practice being prescribed by this section, authorizing the trial court to advise the jury to acquit if it deems the evidence insufficient. *State v. DeTonnancour*, 112 M 94, 98, 112 P 2d 1065.

Operation and Effect

If a trial judge is of the opinion that the defendant, if convicted, should be granted a new trial because of the insufficiency of the evidence, it is his duty to advise the jury to return a verdict of not guilty. *State v. Fisher*, 23 M 540, 555, 59 P 919.

This section is applicable to those cases only in which the trial court deems the evidence, although tending to prove every element necessary to constitute the crime charged, insufficient in weight to warrant a conviction. *State v. Mahoney*, 24 M 281, 286, 61 P 647.

In a criminal prosecution the trial court may not direct a verdict in favor of defendant, it, under this section, being

authorized to do no more, when it deems the evidence insufficient to warrant conviction, than to advise the jury to acquit. *State v. Collins*, 88 M 514, 523, 294 P 957.

By this section, the trial court is prohibited from directing a verdict in any criminal case; if the advice be disregarded by the jury, the remedy is by granting a new trial. *State v. Thierfelder*, 114 M 104, 111, 132 P 2d 1035.

In a criminal action the trial court may not direct, but can only advise, the jury to return a verdict in favor of defendant. *State v. Wong Sun*, 114 M 185, 192, 133 P 2d 761.

Where there is an utter failure of proof as to one or more of the essential elements of the offense charged, the trial court has the duty to order the jury to return a verdict of not guilty, but where there is evidence tending to prove every element necessary to constitute the offense charged but such evidence is insufficient in weight to warrant a conviction, the court may advise the jury to acquit but the jury is not bound by the advice. *State v. Labbitt*, 117 M 26, 35, 156 P 2d 163.

References

Cited or applied as section 2096, Penal Code, in *State v. Welch*, 22 M 92, 99, 55 P 927; *State v. Auchard*, 22 M 14, 15, 55 P 361; *State v. Koch*, 33 M 490, 498, 85 P 272; as section 9297, Revised Codes, in *State v. Tate*, 55 M 343, 177 P 243; *State v. Gomez*, 58 M 177, 180, 190 P 982; *State v. Moe*, 68 M 552, 553, 219 P 830.

Criminal Law \S 753 (2).

23 C.J.S. Criminal Law $\S\S$ 1145, 1147.

53 Am. Jur. 330, Trial, $\S\S$ 415 et seq.

94-7228. (11996) **View of place of offense or property.** When in the opinion of the court it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, or in cases involving the brand or mark or identity of livestock, or other personal property, it may order the jury to be conducted in a body in the custody of the sheriff and in the presence of the defendant and his counsel to the place which must be shown to them by a person appointed by the court for that purpose; and in cases involving the brand or mark on, and identity of livestock or other personal property, the jury must be conducted in a body in the custody of the sheriff and in the presence of the defendant and his attorney to a convenient place where the livestock or personal property in question can be shown to them by a person appointed by the court that they may personally inspect the same; and the sheriff must be sworn to suffer no person to speak to or communicate with the jury, nor to do so himself on any subject connected with the trial, and return them into the court without unnecessary delay or at a specified time, as the court may direct.

History: Ap. p. Sec. 321, p. 239, Cod. Stat. 1871; re-en. Sec. 321, 3d Div. Rev. Stat. 1879; re-en. Sec. 322, 3d Div. Comp. Stat. 1887; amd. Sec. 2097, Pen. C. 1895; en. Sec. 1, Ch. 113, L. 1907; re-en. Sec. 9298, Rev. C. 1907; re-en. Sec. 11996, R. C. M. 1921. Cal. Pen. C. Sec. 1119.

Defendant May Waive Right to Be Present

Since the only purpose of a view by the jury of the place where a homicide was committed is to enable the jurors better to understand the evidence heard by them at the trial and testimony may not there be taken for any purpose, the defendant may waive his right to be present at the viewing, and where he did not make a request for permission to be present at the view of an automobile in and near which the shooting occurred, he will be held to have waived his right in that behalf. *State v. Cates*, 97 M 173, 191, 33 P 2d 578.

Operation and Effect

The matter of permitting the jury to review cattle charged to have been stolen by defendant and recaptured was one within the discretion of the trial court, and in the absence of a showing of abuse of its discretion in that behalf error may not be said to have been committed in permitting the viewing. *State v. Arnold*, 84 M 348, 362, 275 P 757.

Waiver of Alleged Error in Permitting View

By failing to object to an order of the trial court, made in its discretion and at the close of the testimony in a prosecution for murder, permitting the jury to view

an automobile in which the shooting occurred, defendant waived his right to secure a review of the propriety of the order urged on the ground that no proper foundation had been laid for the view in that it was not shown that the car was in the same condition as at the time of the killing. *State v. Cates*, 97 M 173, 191, 33 P 2d 578.

References

Cited or applied as section 2097, Penal Code, before amendment, in *State v. Landry*, 29 M 218, 226, 74 P 418; *May v. Northern Pacific Ry. Co.*, 32 M 522, 535, 81 P 328.

Criminal Law—651 (1, 2).

23 C.J.S. Criminal Law § 986.

53 Am. Jur. 349, Trial, §§ 441-451.

Occurrences during a view as warning the jury's discharge without letting in plea of former jeopardy upon subsequent trial. 4 ALR 1266.

Presence of accused during view by jury. 30 ALR 1357.

May demonstration before jury, otherwise proper, be permitted outside court room. 60 ALR 574.

Right of jurors to sustain their verdict by affidavits or testimony to effect that they were not influenced by impressions from unauthorized view of the property. 93 ALR 1452.

Proper procedure to guard party against prejudicing jury by objecting to opposite party's request for view. 95 ALR 1505.

Discretion of trial court in criminal case as to permitting or denying view of premises where crime was committed. 124 ALR 841.

94-7229. (11997) Knowledge of juror to be declared in court and he to be sworn as a witness. If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If, during the retirement of jury, a juror declare a fact which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness, and examined in the presence of the parties.

History: Ap. p. Sec. 192, p. 246, Ban-nack Stat.; re-en. Sec. 313, p. 238, Cod. Stat. 1871; re-en. Sec. 313, 3d Div. Rev. Stat. 1879; re-en. Sec. 314, 3d Div. Comp. Stat. 1887; en. Sec. 2098, Pen. C. 1895; re-en. Sec. 9299, Rev. C. 1907; re-en. Sec.

11997, R. C. M. 1921. Cal. Pen. C. Sec. 1120.

Witnesses—68.

70 C.J. Witnesses § 242.

94-7230. (11998) Jurors, separation of, during trial. The jurors sworn to try an action may, at any time before the submission of the cause to the jury, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. The officer must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to them or communicate with them, nor to do so himself, on any subject con-

nected with the trial, and to return them into court at the next meeting thereof.

History: En. Sec. 2099, Pen. C. 1895; re-en. Sec. 9300, Rev. C. 1907; re-en. Sec. 11998, R. C. M. 1921. Cal. Pen. C. Sec. 1121.

Impliedly Repealing Earlier Statute on Separation After Charge

This section enacted some twenty years after adoption of sec. 94-7237, and declaring that the jury may be permitted to separate at any time before submission of the case to them, held, to impliedly repeal said sec. 94-7237 supra, prohibiting separation of the jury in criminal cases

"after hearing the charge"; hence error was not committed in permitting separation for lunch after the giving of instructions and before the argument of counsel, i. e. at any time before submission of the case to them. *State v. DeTonancour*, 112 M 94, 99, 112 P 2d 1065.

Criminal Law ⚖854 (1-9).

23 C.J.S. Criminal Law §§ 1355-1359.

53 Am. Jur. 626, Trial, §§ 861 et seq.

Separation of jury as requiring discharge or acquittal of accused. 79 ALR 843.

94-7231. (11999) Jury at each adjournment, must be admonished, etc.

The jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves, or with any one else, on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them.

History: En. Sec. 193, p. 246, Bannack Stat.; re-en. Sec. 314, p. 238, Cod. Stat. 1871; re-en. Sec. 314, 3d Div. Rev. Stat. 1879; re-en. Sec. 315, 3d Div. Comp. Stat. 1887; amd. Sec. 2100, Pen. C. 1895; re-en. Sec. 9301, Rev. C. 1907; re-en. Sec. 11999, R. C. M. 1921. Cal. Pen. C. Sec. 1122.

Operation and Effect

The court is not required, under this section, to admonish the jury before it has been completed; as, where a recess has been taken before the completion of the jury; the body of men intended for a jury is not such, under section 93-1203, until it has been sworn to try and determine by verdict a question of fact. *State v. Hall*, 55 M 182, 186, 175 P 267.

Id. The record on appeal in a criminal cause which disclosed that when an ad-

journment was taken, "the jury was admonished by the court and placed in charge of the sheriff," etc., was sufficient to disclose compliance with this section, imported verity, and could not be impeached by affidavit.

Id. Where a jury was completed on the afternoon of the 6th of the month, and an adjournment was then taken until the 7th, and at noon on the 7th a recess was taken until 1:30 p. m. of that day, a new trial will not be granted because of the failure of the court to give to the jury the full statutory admonition, where the jury was properly admonished, as required by this section, at each adjournment taken after the noon recess on the 7th.

Criminal Law ⚖852.

23 C.J.S. Criminal Law § 1361.

94-7232. (12000) Jurors becoming unable to perform duties. If, before the conclusion of the trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case, or if the juror should die, if any alternate jurors have been selected, one of them shall be drawn by the clerk to take the place of that juror. If, after all alternate jurors have been made regular jurors, a juror becomes so sick as to be unable to perform his duties and has been discharged by the court, or if a juror should die, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterwards impaneled. If the judge becomes sick, he may discharge the jury.

History: Ap. p. Sec. 324, p. 239, Cod. Stat. 1871; re-en. Sec. 324, 3d Div. Rev. Stat. 1879; re-en. Sec. 325, 3d Div. Comp. Stat. 1887; en. Sec. 2101, Pen. C. 1895; re-en. Sec. 9302, Rev. C. 1907; re-en. Sec.

12000, R. C. M. 1921; amd. Sec. 1, Ch. 54, L. 1935. Cal. Pen. C. Sec. 1123.

Jury ⚖149.

50 C.J.S. Juries §§ 289-291.

Substitution of juror after completion of panel as sustaining plea of double jeopardy. 28 ALR 849.

Illness or death of member of juror's family as justification for declaring mistrial and discharging jury in criminal case. 53 ALR 1062.

94-7233. (12001) **Court to decide questions of law arising during trial.** The court must decide all questions of law which arise in the course of a trial.

History: En. Sec. 2102, Pen. C. 1895; re-en. Sec. 9303, Rev. C. 1907; re-en. Sec. 12001, R. C. M. 1921. Cal. Pen. C. Sec. 1124.

Criminal Law 734.
23 C.J.S. Criminal Law §§ 1118, 1121, 1122, 1123, 1134, 1136, 1142.

94-7234. (12002) **Conviction or acquittal.** When the defendant has been convicted or acquitted upon an indictment or information for an offense, consisting of different degrees, the conviction or acquittal is a bar to another indictment or information for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein.

History: En. Sec. 2103, Pen. C. 1895; re-en. Sec. 9304, Rev. C. 1907; re-en. Sec. 12002, R. C. M. 1921. Cal. Pen. C. Sec. 1112.

References

Cited or applied as section 313, Third Division Compiled Statutes 1887, in *Territory v. Willard*, 8 M 328, 332, 21 P 301; as section 2103, Penal Code, in *State v. Keerl*, 33 M 501, 510, 85 P 862.

Criminal Law 186, 187, 199.

22 C.J.S. Criminal Law §§ 264-266, 268, 269, 270, 276, 283, 476.

Conviction or acquittal of robbery as bar to subsequent prosecution for murder done in the perpetration of the robbery. 4 ALR 702.

Conviction or acquittal of larceny as bar to prosecution for burglary. 19 ALR 626.

Conviction or acquittal upon charge of murder of one person as bar to prosecution for like offense against another person at the same time. 20 ALR 341.

Conviction or acquittal in one district as bar to prosecution in another, based on continuous transportation of intoxicating liquor. 24 ALR 1125.

Acquittal as bar to a prosecution for perjury committed at trial. 37 ALR 1290.

Acquittal or conviction of assault and battery as bar to prosecution for rape, or assault with intent to commit rape, based on same transactions. 78 ALR 1213.

Conviction or acquittal under charge of assault with intent to rob as bar to prosecution for assault with intent to kill based on same transaction or on closely connected transactions. 81 ALR 701.

Conviction or acquittal on charge which includes element of illicit sexual intercourse as bar to prosecution for adultery. 94 ALR 405.

Conviction or acquittal on charge of assault on one person as bar to prosecution for assault against another person at the same time. 113 ALR 222.

Double jeopardy where jury is discharged before termination of trial because of illness of accused. 159 ALR 750.

94-7235. (12003) **On indictment for libel, jury to determine law and fact.** On a trial for libel, the jury has the right to determine the law and the fact.

History: Ap. p. Sec. 116, p. 205, *Bannack Stat.*; re-en. Sec. 139, p. 301, *Cod. Stat.* 1871; re-en. Sec. 139, 4th Div. *Rev. Stat.* 1879; re-en. Sec. 154, 4th Div. *Comp. Stat.* 1887; amd. Sec. 2104, Pen. C. 1895; re-en. Sec. 9305, Rev. C. 1907; re-en. Sec.

12003, R. C. M. 1921. Cal. Pen. C. Sec. 1125.

Libel and Slander 158.

37 C.J. Libel and Slander § 703.

94-7236. (12004) **In all other cases court to decide questions of law.** On a trial for any other offense than libel, questions of law are to be decided by the court, questions of fact by the jury; although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court.

History: En. Sec. 2105, Pen. C. 1895; re-en. Sec. 9306, Rev. C. 1907; re-en. Sec. 12004, R. C. M. 1921. Cal. Pen. C. Sec. 1126.

Operation and Effect

The jury have the power to disregard the law as declared and acquit defendant, however convincing the evidence may be,

and the court has no power to punish them for such conduct. State v. Koch, 33 M 490, 497, 85 P 272.

Criminal Law⊕734, 737 (1).

23 C.J.S. Criminal Law §§ 1118, 1120, 1121, 1122, 1123, 1134, 1136, 1142.

53 Am. Jur. 141, Trial, §§ 156 et seq.

94-7237. (12005) Jury may decide in court, or retire in custody of officer. After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, an officer must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor to do so himself, unless by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court.

History: Ap. p. Sec. 194, p. 246, Ban-nack Stat.; re-en. Sec. 315, p. 238, Cod. Stat. 1871; re-en. Sec. 315, 3d Div. Rev. Stat. 1879; re-en. Sec. 316, 3d Div. Comp. Stat. 1887; en. Sec. 2106, Pen. C. 1895; re-en. Sec. 9307, Rev. C. 1907; re-en. Sec. 12005, R. C. M. 1921. Cal. Pen. C. Sec. 1128.

Impliedly Repealed on Separation after Charge

This section, prohibiting separation of the jury in criminal cases "after hearing the charge", held impliedly repealed by sec.

94-7230, enacted some twenty years after adoption of this section, and declaring that the jury may be permitted to separate at any time before submission of the case to them; hence error was not committed in permitting separation for lunch after the giving of instructions and before the argument of counsel, i. e. at any time before submission of the case to them. State v. DeTonancour, 112 M 94, 99, 112 P 2d 1065.

Criminal Law⊕850.

23 C.J.S. Criminal Law § 1354.

94-7238. (12006) Defendant appearing for trial may be committed. When a defendant who has given bail appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the court, and he must be committed and held in custody accordingly.

History: En. Sec. 2107, Pen. C. 1895; re-en. Sec. 9308, Rev. C. 1907; re-en. Sec. 12006, R. C. M. 1921. Cal. Pen. C. Sec. 1129.

Criminal Law⊕637.

23 C.J.S. Criminal Law § 977.

94-7239. (12007) If county attorney fails to attend, court may appoint. If the county attorney fails to attend at the trial, the court must appoint some attorney-at-law to perform the duties of the county attorney before the grand jury or otherwise.

History: En. Sec. 2108, Pen. C. 1895; re-en. Sec. 9309, Rev. C. 1907; re-en. Sec. 12007, R. C. M. 1921. Cal. Pen. C. Sec. 1130.

Operation and Effect

An attorney appointed under this section to perform the duties of a county attorney in a proceeding in which the latter was sought to be removed upon the accusation of a taxpayer charging neglect of duty, may not demand or receive compensation

for his services out of the county treasury, the statute not making any provision therefor, and the county not being liable as upon an implied contract to pay what the services are reasonably worth. State ex rel. McGrade v. District Court, 52 M 371, 374, 375, 157 P 1157.

Id. The district court is vested with the power of appointment of some attorney in any criminal case when the emergency contemplated by this section arises, and of removal, where a disqualification of the

attorney appointed appears, and while the court will usually choose some one from among the local attorneys, it is not required to do so.

Criminal Law 639 (2).
27 C.J.S. District and Prosecuting Attorneys § 28.

94-7240. (12008) Trials for larceny. Upon a trial for larceny of money, bank notes, certificates of stock, or valuable securities, the allegation of the indictment or information, so far as regards the description of the property, is sustained if the offender be proved to have embezzled or stolen any money, bank notes, certificates of stock, or valuable securities, although the particular species of coin or other money, or the number, denomination, or kind of bank notes, certificates of stock, or valuable security be not proved; and upon a trial for larceny, if the offender be proved to have stolen any piece of coin or other money, any bank note, certificate of stock, or valuable security, although such piece of coin or other money, or such bank note, certificate of stock, or valuable security, may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly.

History: En. Sec. 2109, Pen. C. 1895; re-en. Sec. 9310, Rev. C. 1907; re-en. Sec. 12008, R. C. M. 1921. Cal. Pen. C. Sec. 1131.

the property is sustained if it be proved that defendant has stolen any money or bank notes. State v. Rodgers, 21 M 143, 53 P 97.

Operation and Effect

Larceny is included in the crime of robbery, and in a prosecution for robbery the allegation of the information describing

Larceny 58.

36 C.J. Larceny § 483 et seq.
32 Am. Jur. 1031, Larceny, §§ 119 et seq.

CHAPTER 73

CONDUCT OF JURY AFTER SUBMISSION OF CASE

- Section 94-7301. Accommodations for jury, separate room for women jurors.
94-7302. Accommodations for jury when kept together.
94-7303. What papers the jury may take with them.
94-7304. After retirement, may return into court for information.
94-7305. If juror, after retirement, becomes sick, etc.
94-7306. Not to be discharged unless there is no probability that they can agree.
94-7307. When discharged without verdict, cause to be again tried.
94-7308. Court may adjourn during absence, but deemed open.

94-7301. (12009) Accommodations for jury, separate room for women jurors. A room must be provided by the county commissioners of each county for the use of the jury, upon their retirement for deliberation, with suitable furniture, fuel, lights and stationery. If the county commissioners neglect, the court may order the sheriff to do so, and the expenses incurred by him in carrying the order into effect, when certified by the court, are a county charge; provided, however, as it shall become necessary for the jury to retire for the night, then, said board of county commissioners shall provide a room for the female members of the jury which shall be separate and apart from the room provided for the male members.

History: En. Sec. 2120, Pen. C. 1895; re-en. Sec. 9311, Rev. C. 1907; re-en. Sec. 12009, R. C. M. 1921; amd. Sec. 1, Ch. 29, L. 1945. Cal. Pen. C. Sec. 1135.

Criminal Law 857 (1).
23 C.J.S. Criminal Law § 1368.

94-7302. (12010) **Accommodations for jury when kept together.** When the jury are kept together, either during the progress of the trial or after retirement for deliberation, they must be provided by the sheriff, at the expense of the county, with suitable and sufficient food and lodging.

History: En. Sec. 323, p. 239, Cod. Stat. 1871; re-en. Sec. 323, 3d Div. Rev. Stat. 1879; re-en. Sec. 324, 3d Div. Comp. Stat. 1887; amd. Sec. 2121, Pen. C. 1895; re-en.

Sec. 9312, Rev. C. 1907; re-en. Sec. 12010, R. C. M. 1921. Cal. Pen. C. Sec. 1136.

Criminal Law 848.

23 C.J.S. Criminal Law §§ 1349, 1350, 1358.

94-7303. (12011) **What papers the jury may take with them.** Upon retiring for deliberation, the jury may take with them all papers (excepting depositions) which have been received as evidence in the cause, or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them the written instructions and notes of the testimony or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person.

History: En. Sec. 2122, Pen. C. 1895; re-en. Sec. 9313, Rev. C. 1907; re-en. Sec. 12011, R. C. M. 1921. Cal. Pen. C. Sec. 1137.

Operation and Effect

Where on motion for new trial it is found that counsel for defendant consented to the taking of certain exhibits to the jury room previously admitted in evidence on a prosecution for murder, such consent constitutes a waiver of any objection to the sending of the exhibits to the jury during retirement. *State v. Allen*, 23 M 118, 57 P 725.

Section 94-7004, requires the personal presence of the defendant at the trial in felony cases. After the jury had retired to the jury room for deliberation of their verdict they requested that certain exhibits consisting of a gun, a pair of shoes and other articles found in defendant's room, be sent to them. While defendant was not present in the court-room, his counsel gave his consent. Held, that the proceeding did not constitute a part of the trial and therefore defendant's presence was not required, and that defendant's counsel having given his consent, the court did not abuse its discretion in complying with the jury's request, even though the exhibits were not of the nature of those authorized by this section to be taken to the jury room. *State v. Olson*, 87 M 389, 395, 287 P 938.

Where exhibits consisting of photographs of the automobile in which some of the shots resulting in the killing of deceased had been fired and of the body of deceased, a pistol taken from defendant after the shooting, revolver clips, etc., all of which had been admitted in evidence without objection by defendant, were taken to the jury room, at the close of the trial, apparently without the affirmative consent of the defendant and without an order of the court permitting it to be done, but there was no showing that by the procedure the jury were given any other information than that obtained at the trial, it may not be presumed that the procedure resulted to the prejudice of defendant. *State v. Cates*, 97 M 173, 197, 33 P 2d 578.

Held, that it was error for the trial court to send to the jury room as an exhibit an alleged confession headed "Affidavit," which to all intents and purposes was a deposition, in view of this section which expressly prohibits the jury from taking depositions to the jury room for consideration during its deliberations. *State v. Crighton*, 97 M 387, 403, 404, 34 P 2d 511.

Criminal Law 858 (1-4).

23 C.J.S. Criminal Law § 1369.

53 Am. Jur. 659, Trial, §§ 921 et seq.

94-7304. (12012) **After retirement, may return into court for information.** After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information

required must be given in the presence of the county attorney and the defendant and his counsel.

History: En. Sec. 2123, Pen. C. 1895; re-en. Sec. 9314, Rev. C. 1907; re-en. Sec. 12012, R. C. M. 1921. Cal. Pen. C. Sec. 1138.

Operation and Effect

The information referred to in this section is deemed to be oral if it is not in writing at the time of its delivery and read to the jury as written. *State v. Fisher*, 23 M 540, 553, 59 P 919.

Where in a prosecution for rape the jury, after retiring to the jury room, were returned into court for information relative to a certificate of birth of the prosecutrix which had been excluded from the evidence, and an affidavit made by her to the effect that defendant had not committed any offense against her, which was admitted, and the court orally advised them that the certificate had been excluded and that as to the affidavit they would have to determine for themselves, its action in not going further and instructing them orally as to what weight

should be given the affidavit was proper, since under section 94-7201, instructions, in the absence of a waiver by the parties, must be delivered in writing. *State v. Duncan*, 82 M 170, 177 et seq., 266 P 400.

After retiring to the jury room to deliberate of their verdict in a criminal cause, the jury returned, asking the court whether two instructions given were conflicting. The court, in the absence of defendant though in the presence of his attorney, orally instructed the jury to disregard one of them and withdrew it. Held, that withdrawing the instruction and directing the jury to disregard it was instructing the jury orally, constituting reversible error, and that doing so in the absence of the defendant from the court room was contrary to the provisions of this section. *State v. Jackson*, 88 M 420, 434, 293 P 309.

Criminal Law Ⓒ863 (1, 2).

23 C.J.S. Criminal Law § 1376.

73 Am. Jur. 667, Trial, § 942.

94-7305. (12013) If juror, after retirement, becomes sick, etc. If, after the retirement of the jury, one of them be taken so sick as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept for deliberation, the jury may be discharged.

History: Ap. p. Sec. 330, p. 239, Cod. Stat. 1871; re-en. Sec. 330, 3d Div. Rev. Stat. 1879; re-en. Sec. 331, 3d Div. Comp. Stat. 1887; en. Sec. 2124, Pen. C. 1895; re-en. Sec. 9315, Rev. C. 1907; re-en. Sec. 12013, R. C. M. 1921. Cal. Pen. C. Sec. 1139.

NOTE.—See sec. 93-1811 for provision for alternate jurors.

94-7306. (12014) Not to be discharged unless there is no probability that they can agree. Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict, and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless at the expiration of such time as the court may deem proper, it satisfactorily appears that there is reasonable probability that the jury cannot agree.

History: En. Sec. 2125, Pen. C. 1895; re-en. Sec. 9316, Rev. C. 1907; re-en. Sec. 12014, R. C. M. 1921. Cal. Pen. C. Sec. 1140.

Operation and Effect

In a prosecution for murder, where the jury was discharged at the end of a mis-

References

Cited or applied as section 2124, Penal Code, in *State v. Keerl*, 33 M 501, 510, 85 P 862.

Criminal Law Ⓒ867.

23 C.J.S. Criminal Law §§ 1383-1385.

trial, because there was "a reasonable probability that the jury cannot agree," an entry in the minutes in those words was in accordance with this section and sufficient. *State v. Keerl*, 33 M 501, 513, 85 P 862.

53 Am. Jur. 681, Trial, §§ 970 et seq.

94-7307. (12015) When discharged without verdict, cause to be again tried. In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant

is discharged during the progress of the trial, or after the cause is submitted to them, the cause may be again tried.

History: En. Sec. 331, p. 240, Cod. Stat. 1871; re-en. Sec. 331, 3d Div. Rev. Stat. 1879; re-en. Sec. 332, 3d Div. Comp. Stat. 1887; amd. Sec. 2126, Pen. C. 1895; re-en. Sec. 9317, Rev. C. 1907; re-en. Sec. 12015, R. C. M. 1921. Cal. Pen. C. Sec. 1141.

Operation and Effect

It appears conclusively from this section that the defendant may not be tried again if he has been discharged during the progress of the trial, or after the case has been submitted to the jury, although the jury may have been discharged or prevented from giving a verdict by reason of an accident or other cause. Such a discharge of the prisoner amounts to an acquittal, and brings him within the provision of section 94-4807, although there

has not been any judgment of acquittal as mentioned in section 94-6801. *State v. Keerl*, 33 M 501, 515, 85 P 862.

Id. It seems that where the defendant in a criminal prosecution has been arraigned, and the trial has been begun upon a valid indictment or information, and he is discharged by a competent court before verdict, an acquittal results, and the plea of once in jeopardy will lie.

Whenever jeopardy has occurred for the same offense, and has, without necessity or the procurement of the accused, ended by a discharge of the jury before verdict, the plea of once in jeopardy is available. *State v. Gaimos*, 53 M 118, 122, 162 P 596.

Criminal Law 182.

22 C.J.S. Criminal Law § 259.

94-7308. (12016) Court may adjourn during absence, but deemed open.

While the jury are absent the court may adjourn from time to time, as to other business, but it must nevertheless be open for every purpose connected with the cause submitted to the jury, until a verdict is returned or the jury discharged.

History: En. Sec. 332, p. 240, Cod. Stat. 1871; re-en. Sec. 332, 3d Div. Rev. Stat. 1879; re-en. Sec. 333, 3d Div. Comp. Stat. 1887; re-en. Sec. 2127, Pen. C. 1895; re-en.

Sec. 9318, Rev. C. 1907; re-en. Sec. 12016, R. C. M. 1921. Cal. Pen. C. Sec. 1142.

Criminal Law 857 (1).

23 C.J.S. Criminal Law § 1368.

CHAPTER 74

THE VERDICT

Section 94-7401.	Return of jury.
94-7402.	Appearance of defendant.
94-7403.	Manner of taking verdict.
94-7404.	General verdict.
94-7405.	Insufficient verdict.
94-7406.	Jury to find degree of crime.
94-7407.	Jury may find upon charge of previous conviction.
94-7408.	Jury may convict of lesser offense or of attempt.
94-7409.	Verdict as to some defendants, new trial as to others.
94-7410.	To ascertain value of property.
94-7411.	Jury may assess punishment.
94-7412.	Court may assess punishment.
94-7413.	Same.
94-7414.	Same.
94-7415.	Court may reduce verdict.
94-7416.	Polling jury.
94-7417.	Juror in contempt.
94-7418.	Defendant, when to be discharged.
94-7419.	Proceedings upon conviction.
94-7420.	Proceedings on acquittal on ground of insanity.

94-7401. (12017) Return of jury. When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all do not appear, the

rest must be discharged without giving a verdict. In that case the action may be again tried at the same or another term or session.

History: En. Sec. 2140, Pen. C. 1895; re-en. Sec. 9319, Rev. C. 1907; re-en. Sec. 12017, R. C. M. 1921. Cal. Pen. C. Sec. 1147.

Criminal Law 872.
23 C.J.S. Criminal Law § 1390.
Verdict generally, 53 Am. Jur. 695, Trial, §§ 1004 et seq.

References

State v. Reed, 65 M 51, 55, 210 P 756.

94-7402. (12018) Appearance of defendant. If charged with a felony, the defendant must, before the verdict is received, appear in person. If for a misdemeanor, the verdict may be rendered in his absence.

History: En. Sec. 2141, Pen. C. 1895; re-en. Sec. 9320, Rev. C. 1907; re-en. Sec. 12018, R. C. M. 1921. Cal. Pen. C. Sec. 1148.

the verdict was returned, as required by this section. State v. Hall, 55 M 182, 187, 175 P 267.

Operation and Effect

It must affirmatively appear that one charged with a felony was present when the verdict was received; but this may be shown by every fair intendment of the record. State v. De Lea, 36 M 531, 537, 93 P 814.

Clerk's minutes, in a prosecution for felony, construed on appeal to show that the defendant was present in court when

Under the constitutional and statutory provisions applicable a defendant charged with crime must be present throughout the entire trial, including the rendition of the verdict, and the fact of his presence must be made to appear from the record. State v. Reed, 65 M 51, 55, 210 P 756.

Criminal Law 636 (8).

23 C.J.S. Criminal Law § 974.

53 Am. Jur. 707, Trial, §§ 1024, 1025.

94-7403. (12019) Manner of taking verdict. When the jury agree upon a verdict, they must be brought into court and their names called by the clerk, and if all be present, their foreman must deliver their verdict to the court, who may, with their consent, in their presence, correct the same as to matters of form. The court must deliver the verdict to the clerk, who must file the same, and then read the same to the jury, and ask them if the verdict as recorded is their verdict; if all of the jury in the case of a felony, or two-thirds of their number in the case of a misdemeanor, assent thereto, they must be discharged.

History: Ap. p. Sec. 195, p. 247, Ban-nack Stat.; amd. Sec. 333, p. 240, Cod. Stat. 1871; re-en. Sec. 333, 3d Div. Rev. Stat. 1879; re-en. Sec. 334, 3d Div. Comp. Stat. 1887; en. Sec. 2142, Pen. C. 1895; re-en. Sec. 9321, Rev. C. 1907; re-en. Sec. 12019, R. C. M. 1921. Cal. Pen. C. Secs. 1149 and 1164.

Operation and Effect

The purpose of the provision of this section, requiring the names of the jurors to be called when their verdict is delivered, is to insure their presence before the verdict is delivered. State v. De Lea, 36 M 531, 534, 93 P 814.

Id. While the fact that the defendant in a criminal cause was present when the verdict was received must affirmatively appear, minutes which show his presence during the trial up to the time the jury

retired, and then recite that "defendant thereupon waived the polling of the jury," and "defendant thereupon waives time for sentence and elects to be sentenced at this time," sufficiently meet this requirement. Where, on the poll of the jury one juror answered that the verdict of guilty of burglary was his verdict provided that the sentence was suspended, but thereafter, upon inquiry by the court, unqualifiedly answered that it was his verdict, a motion for dismissal of the information on the ground that the verdict had not been rendered by a full panel was properly denied. State v. Asher, 63 M 302, 306, 206 P 1091.

References

State v. Reed, 65 M 51, 55, 210 P 756.

53 Am. Jur. 700, Trial, §§ 1009 et seq.

94-7404. (12020) General verdict. A verdict upon a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or acquittal of the offense charged in the indictment or information. Upon a plea of a former conviction or acquittal of the same offense, it is either "for the state" or "for the defendant." When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be "not guilty by reason of insanity." When the defendant is acquitted on the ground of variance between the indictment or information and the proof, the verdict must be "not guilty by reason of variance between indictment or information and proof."

History: En. Sec. 2143, Pen. C. 1895; re-en. Sec. 9322, Rev. C. 1907; re-en. Sec. 12020, R. C. M. 1921. Cal. Pen. C. Sec. 1151.

Operation and Effect

Where defendant, charged with assault in the first degree, relied wholly upon the defense of insanity, the court's instruction that the jury might find defendant guilty of assault in the first, second, or third degree, or not guilty was inaccurate; the jury should have been told that, if they found him not guilty because insane, their verdict should be "not guilty by reason of insanity." State v. Crowe, 39 M 174, 184, 102 P 579.

A verdict is not subject to the technical rules which govern pleadings. The object sought in construing a verdict is to ascertain the intention of the jury, and to that end reference may be made to the plead-

ings, the evidence and the instructions of the court. (Consolidated Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152; Tripp v. Silver Dyke Min. Co., 70 M 120, 224 P 272; 16 C.J. 1113, sec. 2606.) In 16 C.J. 1101; it is said: "But a strict adherence to the statutory form of verdict usually is not required; and although the verdict is informal or contains inaccuracies in the language used, if the intention of the jury to return a verdict of guilty or not guilty of the offense charged may be understood readily, it is sufficient." State v. Polich, 70 M 523, 527, 226 P 519.

References

Cited or applied as section 2143, Penal Code, in State v. O'Brien, 19 M 6, 47 P 103; In re Lewis, 51 M 539, 540, 154 P 713.

Criminal Law \hookrightarrow 881 (1).

23 C.J.S. Criminal Law \S 1393.

94-7405. (12021) Insufficient verdict. If the verdict is insufficient, the jury must again retire.

History: En. Sec. 2144, Pen. C. 1895; re-en. Sec. 9323, Rev. C. 1907; re-en. Sec. 12021, R. C. M. 1921.

Operation and Effect

Where a jury in a criminal case brings in a verdict of guilty, and, in the attempted exercise of its right to fix the punishment, has set out in its verdict the maximum of years the defendant is to serve in prison, but has neglected to set out the minimum, the court should, on motion therefor, send it out again to fill in the omission. In re Gomez, 52 M 189, 190, 156 P 1078.

A party cannot be charged with one crime and be convicted of another independent offense; thus, a verdict of guilty of malicious destruction of property is insufficient under a charge of the malicious burning of property; the offense found does not include the offense charged; in such a case it is the right and duty of the trial court to require the jury to return some form of verdict authorized by law, or to report a disagreement. State v. Sieff, 54 M 165, 168, 168 P 524.

Criminal Law \hookrightarrow 889.

23 C.J.S. Criminal Law \S 1412.

53 Am. Jur. 715, Trial, $\S\S$ 1035 et seq.

94-7406. (12022) Jury to find degree of crime. Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty.

History: En. Sec. 196, p. 247, Bannack Stat.; re-en. Sec. 341, p. 241, Cod. Stat. 1871; re-en. Sec. 341, 3d Div. Rev. Stat. 1879; re-en. Sec. 342, 3d Div. Comp. Stat. 1887; amd. Sec. 2145, Pen. C. 1895; re-en. Sec. 9324, Rev. C. 1907; re-en. Sec. 12022, R. C. M. 1921. Cal. Pen. C. Sec. 1157.

Operation and Effect

Where there is evidence tending to show that defendant is guilty of murder in the first degree, murder in the second degree, and manslaughter, it is the duty of the court to instruct that a verdict for manslaughter may be returned, manslaughter

not being a degree of murder. *State v. Shadwell*, 26 M 52, 59, 66 P 508.

There is but one crime of murder, and its division into degrees is simply for the purpose of adjusting the punishment with reference to the presence or absence of circumstances of aggravation. *State v. Hliboka*, 31 M 455, 458, 78 P 965.

In charging burglary, it is not necessary to allege in the information the time of the entry, but the jury, if they convict, must find the degree in accordance with this section. *State v. Copenhagen*, 35 M 342, 344, 89 P 61; *State v. Mish*, 36 M 168, 175, 92 P 459.

Where a specific crime is divided into degrees, it is sufficient to charge the commission of the substantive offense; it is then made the duty of the jury to deter-

mine from the evidence the particular degree of the crime of which the accused is guilty, if guilt is shown. *State v. Wiley*, 53 M 383, 386, 164 P 84.

There is but one crime of murder, its division into degrees and the requirement of this section that the jury must determine the degree of murder, being only for the purpose of adjusting the punishment with reference to the presence or absence of circumstances of aggravation. *State v. Gunn*, 89 M 453, 465, 300 P 212.

References

State v. LeDue, 89 M 545, 562, 300 P 919.

Criminal Law \approx 883.

23 C.J.S. Criminal Law § 1406.

53 Am. Jur. 732, Trial, § 1057.

94-7407. (12023) Jury may find upon charge of previous conviction. Whenever the fact of a previous conviction of another offense is charged in an indictment or information, the jury, if they find a verdict of guilty of the offense with which he is charged, must also, unless the answer of the defendant admits the charge, find whether or not he has suffered such previous conviction. The verdict of the jury upon a charge of previous conviction may be: "We find the charge of previous conviction true," or, "We find the charge of previous conviction not true," as they find that the defendant has or has not suffered such conviction.

History: En. Sec. 2146, Pen. C. 1895; re-en. Sec. 9325, Rev. C. 1907; re-en. Sec. 12023, R. C. M. 1921. Cal. Pen. C. Sec. 1158.

Operation and Effect

A judgment that defendant "be imprisoned in the state prison for the term of ten years, five years upon the conviction for assault in the second degree, and five years for the prior conviction of a felony as by the statute made and provided," is not void as to the five years for former conviction. *State v. Connors*, 27 M 227, 228, 70 P 715.

For a mere informality in the wording of a verdict finding the defendant guilty of robbery and also "guilty of prior convictions," instead of following the language of this section and saying, "We find the charge of previous conviction true," the judgment of conviction will not be reversed, since this provision is directory only, and the verdict in question substantially conformed to it. *State v. Gordon*, 35 M 458, 465, 90 P 173; *State v. Paisley*, 36 M 237, 248, 92 P 566.

In an information charging, among other things, a prior conviction of an offense in another state which, in this state, is punishable by imprisonment in the state prison, it is unnecessary to allege the facts constituting the crime in the foreign state, and it is immaterial whether the offense for which defendant is alleged to have been previously convicted in the sister state is a felony there. *State v. Paisley*, 36 M 237, 247, 92 P 566.

While it is not necessary for the jury to find that a charge of prior conviction is true where the charge is admitted, if it does so find, defendant is not in a position to complain. *State v. O'Neill*, 76 M 526, 528, 248 P 215.

Where defendant's answer admits the charge of a previous conviction finding of previous conviction is unnecessary and jury's failure to make such finding did not render invalid the judgment increasing sentence for a prior conviction. *State ex rel. Williams v. Henry*, ___ M ___, 174 P 2d 220, 222.

Criminal Law \approx 1202 (5).

24 C.J.S. Criminal Law § 1970.

94-7408. (12024) Jury may convict of lesser offense or of attempt. The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense.

History: En. Sec. 2147, Pen. C. 1895; re-en. Sec. 9326, Rev. C. 1907; re-en. Sec. 12024, R. C. M. 1921. Cal. Pen. C. Sec. 1159.

Operation and Effect

Where the defendant was specifically charged with burglary in the night time, constituting the first degree of the offense of burglary, the jury could not convict him of the crime in the second degree, as having been committed in the daytime, since the former does not include the latter, and inasmuch as the defendant need only meet the accusation as made, and not another and a different one, and the prose-

cution is held to proof of the charge as set out in the information. *State v. Copenhaver*, 35 M 342, 345, 89 P 61.

An information charging murder, when stripped of the terms conveying the idea of deliberation, premeditation, and malice, sufficiently charges manslaughter, and the accused may be found guilty of the lesser offense. *State v. Crean*, 43 M 47, 53, 114 P 603.

Id. Murder in the first degree includes manslaughter.

Indictment and Information \S 190, 191.
42 C.J.S. Indictments and Informations
 \S 285.

94-7409. (12025) **Verdict as to some defendants, new trial as to others.** On an indictment or information against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment must be entered accordingly, and the case as to the others may be tried by another jury.

History: En. Sec. 2148, Pen. C. 1895; re-en. Sec. 9327, Rev. C. 1907; re-en. Sec. 12025, R. C. M. 1921. Cal. Pen. C. Sec. 1160.

Criminal Law \S 877.
23 C.J.S. Criminal Law \S 1402.

94-7410. (12026) **To ascertain value of property.** When the indictment or information charges an offense against the property of another, by robbery, larceny, burglary, fraud, or the like, the jury, on conviction, must ascertain and declare in their verdict the value of the property taken, embezzled, or received, and the amount restored, if any, and the value thereof; but their failure to do so does not affect the validity of their verdict.

History: En. Sec. 197, p. 247, Bannack Stat.; re-en. Sec. 342, p. 241, Cod. Stat. 1871; re-en. Sec. 342, 3d Div. Rev. Stat. 1879; re-en. Sec. 343, 3d Div. Comp. Stat. 1887; amd. Sec. 2149, Pen. C. 1895; re-en. Sec. 9328, Rev. C. 1907; re-en. Sec. 12026, R. C. M. 1921.

Operation and Effect

Held, in view of this section providing that in a prosecution for an offense against the property of another, the jury must ascertain and declare in their verdict not only the value of the property taken but also the amount restored, that refusal to permit defendant to introduce evidence to show the amount restored to the person from whom he obtained money by false pretenses was prejudicial error. *State v. Mason*, 62 M 180, 190, 204 P 358.

Where the fact that all of the articles taken by one charged with burglary were found and restored to the owner was before the jury, failure of the verdict to declare the value of the property taken and the amount restored, if any, and the value thereof, as required by this section, which closes with the words that "the jury's failure to do so does not affect the validity of their verdict," was not a fatal defect, if the provisions of the section be to guide the jury in fixing punishment. *State v. Dixon*, 80 M 181, 207, 208, 260 P 138.

Criminal Law \S 870.
23 C.J.S. Criminal Law \S 1399.

94-7411. (12027) **Jury may assess punishment.** In all cases of a verdict of conviction for any offense, when by law there is any alternative or discretion in regard to the kind or extent of punishment to be inflicted, the jury may assess and declare the punishment in their verdict; and the court must render a judgment according to such verdict, except as hereinafter provided.

History: En. Sec. 198, p. 247, Bannack Stat.; re-en. Sec. 343, p. 241, Cod. Stat. 1871; re-en. Sec. 343, 3d Div. Rev. Stat. 1879; re-en. Sec. 344, 3d Div. Comp. Stat. 1887; re-en. Sec. 2150, Pen. C. 1895; re-en. Sec. 9329, Rev. C. 1907; re-en. Sec. 12027, R. C. M. 1921.

Operation and Effect

One on trial for crime has the right to have the jury assess the punishment upon a correct statement of the law as to the penalty prescribed for the offense, and therefore, in view of this section, providing that when there is any alternative or discretion in regard to the kind or extent of the punishment to be inflicted, the jury may assess the punishment in their verdict, an instruction that the penalty for unlawfully possessing and transporting intoxicating liquor was a fine of not more than \$500, or imprisonment for not more than six months, or both such fine and imprisonment, whereas under section 11075, R. C. M. 1921, (since repealed) for the first offense a fine of not more than \$500 could be imposed, was prejudicially erroneous. *State v. Miller*, 69 M 1, 6, 220 P 97.

Under Chapter 202, Laws of 1921, (Sec. 3202 R. C. M. 1921, since repealed) the jury may fix the punishment by their verdict by a fine not exceeding \$1,000 or "by imprisonment for not more than three years, or by both such fine and imprisonment." The court instructed the jury that in case they found defendant guilty they must assess a fine of not less than \$500 nor more than \$3,000 and imprisonment for not less than one nor more than five years. Held, prejudicially erroneous. *State v. Mark*, 69 M 18, 27, 220 P 94.

94-7412. (12028) Court may assess punishment. When a jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, or assess a punishment not authorized by law, and in all cases of judgment by confession, the court must assess and declare the punishment, and render judgment accordingly.

History: En. Sec. 199, p. 247, Bannack Stat.; re-en. Sec. 344, p. 241, Cod. Stat. 1871; re-en. Sec. 344, 3d Div. Rev. Stat. 1879; re-en. Sec. 345, 3d Div. Comp. Stat. 1887; re-en. Sec. 2151, Pen. C. 1895; re-en. Sec. 9330, Rev. C. 1907; re-en. Sec. 12028, R. C. M. 1921.

Operation and Effect

This section is applicable to those cases only, excepting judgments rendered upon pleas of guilty, wherein the jury have made every finding necessary to enable them to fix the punishment, but cannot agree upon the extent of it within the

But there is a stronger reason for upholding the rulings of the trial court. Under the provisions of this section, the jury in this case was authorized to fix the punishment within the limits prescribed by law, and, if the privilege were exercised, then section 12075, R. C. M. 1921, (since repealed) required the jury to designate in the verdict a minimum and a maximum punishment. In order to fix the punishment for the aggravated offense, it was indispensable that the jury know: (a) That prior convictions were charged and the nature of the offenses referred to in the charge; (b) that the charge was established by evidence or the admission of the defendant; and (c) what punishment was prescribed by law for the aggravated offense. To withhold from the jury all information concerning the charge of prior convictions would deny to the jury the right to fix the punishment and would, in effect, annul the provisions of this section. *State v. O'Neill*, 76 M 526, 533, 248 P 215.

While the jury may, if they see fit, assess and declare the punishment in their verdict, it is the court which pronounces judgment and sentences the defendant, and the court only can suspend the execution of the sentence and place the defendant on probation. *State v. Simanton*, 100 M 292, 310, 49 P 2d 981.

References

Cited or applied as section 2150, Penal Code, in *State v. Mish*, 36 M 168, 177, 92 P 459; as section 9329, Revised Codes, in *In re Gomez*, 52 M 189, 190, 156 P 1078.

Criminal Law—884.

23 C.J.S. Criminal Law § 1408.

13 Am. Jur. 160, Criminal Law, § 510; 53 Am. Jur. 1034, Trial, § 1059.

limitations prescribed by the statutes. In such cases, if they fail or neglect to fix it, the court may declare it, but not otherwise. *State v. Mish*, 36 M 168, 177, 92 P 459.

An error made by the trial court in the imposition of sentence for crime may be corrected by it. *In re Lewis*, 51 M 539, 154 P 713.

The statute empowering the trial judge to assess the punishment, when the jury has failed to agree thereon, though convicting the accused party, applies also when the attempt by the jury to fix the punishment has been unsuccessful through

its omitting the minimum, after stating the maximum, number of years it would have the party imprisoned. In *re Gomez*, 52 M 189, 191, 156 P 1078.

The jury returned the following verdict: "We, the jury in the above-entitled action, find the defendant, Louis L. Fowler, guilty of the crime of sedition in the manner and form as charged in the information and fix and assess his punishment at the discretion of the court." The contention is made that it is rendered so defective by the misspelling of the word "discretion" that judgment should not be rendered upon it. There can be no doubt what the jury intended, viz., to find the defendant guilty as charged, and to leave the punishment to be fixed by the court. This section authorizes this to be done. If it be conceded, however, that the latter part of the verdict is unintelligible, this may be omitted entirely, leaving a categorical finding of guilty of the crime as charged in the information. Under this section it was the duty of the court to eliminate this part of the verdict and to assess the punishment which in its discretion it thought proper, within the limits prescribed by the statute. (In *re Collins*, 51 M 215, 152 P 40; In *re*

Gomez, 52 M 189, 156 P 1078.) *State v. Fowler*, 59 M 346, 355, 196 P 992.

Complaint is made of the verdict and of the judgment entered thereon, because the verdict rendered on the first and third counts purported to fix the punishment for each "at thirty days," without specifying where the time should be served. No objection was made by the defendant to the verdict at the time of its rendition, and the court was not requested to send the jury out again, under proper instructions, to supply the omission, if there were any. Therefore, whether a verdict in this form is in itself sufficient need not be considered in view of this section and the holding of this court in *In re Gomez*, 52 M 189, 156 P 1078. *State v. Marchindo*, 65 M 431, 457, 211 P 1093.

References

Cited or applied as section 2151, Penal Code, in *State v. Connors*, 27 M 227, 228, 70 P 715; *State v. Miller*, 69 M 1, 7, 220 P 97.

Criminal Law⌘1208 (5).

24 C.J.S. Criminal Law § 1984.

94-7413. (12029) **Same.** If the jury assess a punishment, whether of imprisonment or fine, below the limit prescribed by law, for the offense of which the defendant is convicted, the court must pronounce sentence and render judgment according to the lowest limit prescribed by law in such case.

History: En. Sec. 200, p. 248, *Bannack Stat.*; re-en. Sec. 345, p. 241, *Cod. Stat.* 1871; re-en. Sec. 345, 3d Div. *Rev. Stat.* 1879; re-en. Sec. 346, 3d Div. *Comp. Stat.* 1887; re-en. Sec. 2152, *Pen. C.* 1895; re-en.

Sec. 9331, *Rev. C.* 1907; re-en. Sec. 12029, *R. C. M.* 1921.

Criminal Law⌘993.

24 C.J.S. Criminal Law §§ 1588-1592.

94-7414. (12030) **Same.** If the jury assess a punishment, whether of imprisonment or fine, greater than the highest limit declared by law, for the offense of which they convict the defendant, the court must disregard the excess, and pronounce sentence, and render judgment according to the highest limit prescribed by law in the particular case.

History: En. Sec. 201, p. 248, *Bannack Stat.*; re-en. Sec. 346, p. 241, *Cod. Stat.* 1871; re-en. Sec. 346, 3d Div. *Rev. Stat.* 1879; re-en. Sec. 347, 3d Div. *Comp. Stat.* 1887; re-en. Sec. 2153, *Pen. C.* 1895; re-en.

Sec. 9332, *Rev. C.* 1907; re-en. Sec. 12030, *R. C. M.* 1921.

References

Cited or applied as section 9332, *Revised Codes*, in *In re Lewis*, 51 M 539, 154 P 713.

94-7415. (12031) **Court may reduce verdict.** The court has power in all cases of conviction to reduce the extent or duration of the punishment assessed by a jury, if, in its opinion, the conviction is proper, and the punishment assessed is greater than, under the circumstances of the case, ought to be inflicted.

History: En. Sec. 202, p. 248, *Bannack Stat.*; re-en. Sec. 347, p. 241, *Cod. Stat.* 1871; re-en. Sec. 347, 3d Div. *Rev. Stat.* 1879; re-en. Sec. 348, 3d Div. *Comp. Stat.*

1887; re-en. Sec. 2154, *Pen. C.* 1895; re-en. Sec. 9333, *Rev. C.* 1907; re-en. Sec. 12031, *R. C. M.* 1921.

Operation and Effect

Held, on certiorari, that the power given the district court by this section, to reduce the extent of punishment fixed by the jury in a criminal prosecution, must be exercised prior to or at the time judgment is pronounced, and that therefore an order reducing a fine and jail sentence after the judgment had been in process of execution for a number of days was void as in excess

of jurisdiction, and an encroachment upon the pardoning power reposed by the Constitution in the governor and the state pardoning board. *State ex rel. Reid v. District Court*, 68 M 309, 311, 218 P 558.

References

State ex rel. Bottomly v. District Court, 73 M 541, 545, 237 P 525.

94-7416. (12032) Polling jury. When a verdict is rendered, the jury may be polled, at the request of either party, in which case they must be severally asked whether it is their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation, and in case of misdemeanors if more than one-third so answer.

History: Ap. p. Sec. 334, p. 240, Cod. Stat. 1871; re-en. Sec. 334, 3d Div. Rev. Stat. 1879; re-en. Sec. 335, 3d Div. Comp. Stat. 1887; en. Sec. 2155, Pen. C. 1895; re-en. Sec. 9334, Rev. C. 1907; re-en. Sec. 12032, R. C. M. 1921. Cal. Pen. C. Sec. 1163.

Operation and Effect

Where on the poll of the jury one juror answered that the verdict of guilty of burglary was his verdict provided the

sentence was suspended, but thereafter, upon inquiry by the court, unqualifiedly answered that it was his verdict, a motion for dismissal of the information on the ground that the verdict had not been rendered by a full panel was properly denied. *State v. Asher*, 63 M 302, 306, 206 P 1091.

Criminal Law⊕874.

23 C.J.S. Criminal Law § 1392.

53 Am. Jur. 703, Trial, §§ 1015 et seq.

94-7417. (12033) Juror in contempt. A juror who does not dissent to the verdict, when the same is read to him by the clerk, if such is not his verdict, is guilty of contempt of court.

History: En. Sec. 335, p. 240, Cod. Stat. 1871; re-en. Sec. 335, 3d Div. Rev. Stat. 1879; re-en. Sec. 336, 3d Div. Comp. Stat. 1887; amd. Sec. 2156, Pen. C. 1895; re-en.

Sec. 9335, Rev. C. 1907; re-en. Sec. 12033, R. C. M. 1921.

Contempt⊕14.

17 C.J.S. Contempt § 22.

94-7418. (12034) Defendant, when to be discharged. If judgment of acquittal is given on a general verdict, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given, except where the acquittal is because of a variance between the pleading and proof, which may be obviated by a new indictment or information, the court may order his detention, to the end that a new indictment or information may be preferred, in the same manner and with like effect as provided in section 94-7226.

History: En. Sec. 2157, Pen. C. 1895; re-en. Sec. 9336, Rev. C. 1907; re-en. Sec. 12034, R. C. M. 1921. Cal. Pen. C. Sec. 1165.

References

State v. Lund, 93 M 169, 188, 18 P 2d 603.

Criminal Law⊕893.

23 C.J.S. Criminal Law § 1409.

94-7419. (12035) Proceedings upon conviction. If a verdict is rendered against the defendant, he must be remanded, if in custody, or if on bail, must be committed to the proper officer of the county to await the judgment of the court upon the verdict. When committed, his bail is exonerated, or if money is deposited instead of bail, it must be refunded to the defendant.

History: Ap. p. Sec. 337, p. 240, Cod. Stat. 1871; re-en. Sec. 337, 3d Div. Rev. Stat. 1879; re-en. Sec. 338, 3d Div. Comp. Stat. 1887; en. Sec. 2158, Pen. C. 1895; re-en. Sec. 9337, Rev. C. 1907; re-en. Sec. 12035, R. C. M. 1921. Cal. Pen. C. Sec. 1166.

Bail 73, 74 (1); Criminal Law 999 (1).

8 C.J.S. Bail §§ 52, 53, 76; 24 C.J.S. Criminal Law §§ 1608-1612.

94-7420. (12036) Proceedings on acquittal on ground of insanity. If the jury render a verdict of acquittal on the ground of insanity, the court may order a jury to be summoned from the jury list of the county, to inquire whether the defendant continues to be insane. The court may cause the same witnesses to be summoned who testified on the trial, and other witnesses, and direct the county attorney to conduct the proceedings, and counsel may appear for the defendant. The court may direct the sheriff to take the defendant and retain him in custody until the question of continuing insanity is determined. If the jury find the defendant insane, he shall be committed by the sheriff to the state insane asylum. If the jury find the defendant sane, he shall be discharged.

History: En. Sec. 2159, Pen. C. 1895; re-en. Sec. 9338, Rev. C. 1907; re-en. Sec. 12036, R. C. M. 1921. Cal. Pen. C. Sec. 1167.

Constitutionality of statutes relating to determination of plea of insanity in criminal case. 67 ALR 1451.

Constitutionality of statute which provides for commitment of accused acquitted on ground of insanity to hospital for insane without examination of present mental condition. 145 ALR 892.

Test or criterion of mental condition within contemplation of statute providing for commitment of persons because of mental condition. 158 ALR 1220.

Criminal Law 625.

23 C.J.S. Criminal Law § 940.

14 Am. Jur. 788, Criminal Law, §§ 32 et seq.

Test of present insanity preventing trial or punishment. 3 ALR 94.

Remedy of one convicted while insane. 10 ALR 213.

CHAPTER 75

BILLS OF EXCEPTION

- Section 94-7501. In what cases.
 94-7502. Exceptions to decision of court by either party.
 94-7503. Exceptions to decision of court by the defendant.
 94-7504. Exceptions, how settled by supreme court.
 94-7505. Exceptions in criminal trials—when not necessary.
 94-7506. What bill of exceptions to contain.
 94-7507. Settlement of bills of exceptions.
 94-7508. Record on appeal in criminal cases.

94-7501. (12037) In what cases. On the trial of an indictment or information exceptions may be taken by the defendant to a decision of the court—

1. In disallowing a challenge to the panel of the jury, or to an individual juror for implied bias;
2. In admitting or rejecting testimony on the trial of a challenge to a juror for actual bias;
3. In admitting or rejecting testimony, or in deciding any question of law not a matter of discretion, or in charging or instructing the jury upon the law on the trial of the issue.

History: En. Sec. 2170, Pen. C. 1895; 12037, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9339, Rev. C. 1907; re-en. Sec. 1170.

Operation and Effect

An exception is allowed, under this section, to the action of the court in overruling, but not in sustaining, a challenge to an individual juror for implied bias. *State v. Jones*, 32 M 442, 450, 80 P 1095.

References

Cited or applied as section 2170, Penal Code, in *State v. Tighe*, 27 M 327, 329, 71

P 3; *State v. Carmichael*, 62 M 159, 160, 204 P 362; *State v. Brantingham*, 66 M 1, 6, 7, 212 P 499.

Criminal Law 697, 839; Jury 142.

23 C.J.S. Criminal Law §§ 1076, 1341; 50 C.J.S. Juries § 285.

3 Am. Jur. 47, Appeal and Error, § 271 et seq.

94-7502. (12038) Exceptions to decision of court by either party. The decision of a court or judge upon a matter of law is deemed excepted to by either party in the following cases:

1. In granting or refusing a motion to set aside an indictment or information.
2. In allowing or disallowing a demurrer to an indictment or information.
3. In granting or refusing a motion in arrest of judgment.
4. In granting or refusing a motion for a new trial.
5. In making, or refusing to make, an order after judgment affecting any substantial right of the parties.

History: En. Sec. 2172, Pen. C. 1895; re-en. Sec. 9341, Rev. C. 1907; re-en. Sec. 12038, R. C. M. 1921. Cal. Pen. C. Sec. 1172.

P 736; *State v. Safeway Stores, Inc.*, 106 M 182, 198, 76 P 2d 81.

References

Cited or applied as section 2172, Penal Code, in *State v. Kremer*, 34 M 6, 8, 85

Criminal Law 964, 975; Indictment and Information 140 (1), 150.

23 C.J.S. Criminal Law §§ 1478, 1509-1511, 1550; 42 C.J.S. Indictments and Informations §§ 196, 214, 216, 223.

94-7503. (12039) Exceptions to decision of court by the defendant. The decision of the court or judge upon a matter of law is deemed excepted to by the defendant in the following cases:

1. In refusing to grant a motion for a change of place of trial.
2. In refusing to postpone the trial on motion of the defendant.

History: En. Sec. 2173, Pen. C. 1895; re-en. Sec. 9342, Rev. C. 1907; re-en. Sec. 12039, R. C. M. 1921. Cal. Pen. C. Sec. 1173.

References

Cited or applied as section 2173, Penal Code, in *State v. Kremer*, 34 M 6, 8, 85 P 736.

Criminal Law 145, 617.

22 C.J.S. Criminal Law §§ 222, 525.

94-7504. (12040) Exceptions, how settled by supreme court. If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same, the application may be made in the mode and manner, and under such regulations as the court may prescribe; and the bill, when proven, must be certified by the chief justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed, it has the same force and effect as if settled by the judge who tried the cause. If the judge who presided at the trial ceases to hold office before the bill is tendered or settled, he may nevertheless settle such bill, or the party may, as provided in this section, apply to the supreme court to prove the same.

History: En. Sec. 2174, Pen. C. 1895;
re-en. Sec. 9343, Rev. C. 1907; re-en. Sec.
12040, R. C. M. 1921.

Criminal Law 1092 (1-18).
24 C.J.S. Criminal Law §§ 1755-1757,
1759-1762.
3 Am. Jur. 267, Appeal and Error,
§§ 667 et seq.

94-7505. (12041) Exceptions in criminal trials—when not necessary. On trial of an indictment or information it shall not be necessary to ask for or note an exception to any of the rulings or decisions of the trial court or judge upon matters enumerated in sections 94-7501, 94-7502 and 94-7503, but nothing herein contained shall be deemed to dispense with the necessity for making objections nor to dispense with the making and settlement of bills of exceptions in the manner provided by law. This act shall not affect the procedure prescribed by section 94-7201, relating to the settlement of instructions, save that no exception need be noted to any instruction nor to any order of the court relating thereto.

History: En. Sec. 15, Ch. 225, L. 1921;
re-en. Sec. 12041, R. C. M. 1921.

References

State v. Daw, 99 M 232, 43 P 2d 240;
State v. Safeway Stores, Inc., 106 M 182,
198, 76 P 2d 81.

Criminal Law 1030 (1), 1048, 1090
(1).
24 C.J.S. Criminal Law §§ 1676, 1681,
1689, 1751.
3 Am. Jur. 47, Appeal and Error, § 272.

94-7506. (12042) What bill of exceptions to contain. A bill of exceptions must contain so much of the evidence only as is necessary to present the question of law upon which the exceptions were taken; and the judge must, upon the settlement of the bill, whether agreed to by the parties or not, strike out all other matters contained therein.

History: En. Sec. 2175, Pen. C. 1895;
re-en. Sec. 9344, Rev. C. 1907; re-en. Sec.
12042, R. C. M. 1921. Cal. Pen. C. Sec.
1175.

Absence of Evidence Precludes Assignments of Error Thereon—Presumption That Verdict Sustained

Where the record on appeal in a criminal case does not contain the evidence, assignments of error based thereon may not be considered by the supreme court. In the absence of a bill of exceptions in which the evidence or such part thereof as is made the foundation of a specification of error might be found, it will be presumed on appeal that the evidence

adduced was sufficient to sustain the verdict of the jury. The same rule obtains on assignments based on instructions, presented by evidence, unless the instruction is inherently erroneous on its face. State v. Wong Sun, 114 M 185, 190, 193, 133 P 2d 761.

References

State v. Safeway Stores, Inc., 106 M 182, 198, 76 P 2d 81.

Criminal Law 1091 (11).

24 C.J.S. Criminal Law § 1753.

3 Am. Jur. 246, Appeal and Error, §§ 637 et seq.

94-7507. (12044) Settlement of bills of exceptions. No bill of exceptions need be prepared or settled while the motion for a new trial is pending, but the same shall be prepared and settled in the same manner and within the same time after the decision of the court on the motion for a new trial as is hereinafter provided for the preparation and settlement of bills of exception after judgment; except as above provided, whenever a party desires to have a bill of exceptions settled he must prepare a draft of a proposed bill and present the same, upon notice of at least two days to the adverse party, to the judge for settlement, within ten days after the order or ruling excepted to is made, or within ten days after judgment has been rendered against him, unless further time is granted by the judge of

the district court or by a justice of the supreme court, or within that period the draft must, upon such notice of at least two days, be delivered to the clerk of the district court for the judge. When received by the clerk he shall deliver it, together with any amendments proposed or objections thereto, to the judge or transmit it to the judge with such amendments and objections, as soon as may be, and, when settled, the bill must be signed by the judge and filed as part of the record of the case.

History: En. Sec. 1, Ch. 34, L. 1903; re-en. Sec. 9346, Rev. C. 1907; amd. Sec. 15A, Ch. 225, L. 1921; re-en. Sec. 12044, R. C. M. 1921.

Notice

The giving of at least two days' notice to the adverse party of the draft of a proposed bill of exceptions is an indispensable prerequisite to the consideration of the bill by the supreme court, and the record must show affirmatively the fact of the giving of such notice. *State v. Kremer*, 34 M 6, 9, 85 P 736. See also *State v. Morrison*, 34 M 75, 78, 85 P 738; *State v. Lee*, 34 M 584, 586, 87 P 977; *State v. Daw*, 99 M 232, 43 P 2d 240.

Delivery of a copy of a proposed bill of exceptions to the county attorney does not meet the requirements of this section relative to notice of at least two days to the adverse party prior to delivery of such bill to the judge for settlement. *State v. Kremer*, 34 M 6, 10, 85 P 736.

Provisions Mandatory

The provisions of this section, relating to the settlement of bills of exceptions in criminal cases, are mandatory. *State v. Kremer*, 34 M 6, 9, 85 P 736.

Time for Presentation

The provision of this section relative to the time for presentation of a bill of exceptions in a criminal case for settlement, in the absence of extension granted by the trial or the supreme court, is mandatory and compliance therewith indispensable to jurisdiction to settle it; hence where a bill required to be presented within ten days after judgment, was not presented until about ten months and a half after entry of judgment, the court was without

jurisdiction to make settlement, and the supreme court on appeal had none for purposes of review. *State v. Vallie*, 82 M 456, 458, 268 P 493.

What Must Be Included in Bill of Exceptions to Be Reviewed

The original and first amended informations, and demurrers to them which were sustained, and a motion to dismiss the prosecution, and order overruling it, were not a part of the appeal record, where they were not embodied in the bill of exceptions. *State v. Stickney*, 29 M 523, 526, 75 P 201.

Alleged error on the part of the district court in refusing to hear evidence, offered by defendant in a criminal prosecution upon his challenge to the jury panel, will not be reviewed on appeal unless presented by bill of exceptions. *State v. Gordon*, 35 M 458, 462, 90 P 173.

Id. An objection to the form in which a prior conviction is pleaded in an information can only be raised by demurrer, which in turn, in order to be reviewable on appeal, must be presented by a bill of exceptions.

References

Cited or applied as section 9346, Revised Codes, in *State v. Lewis*, 52 M 495, 501, 159 P 415; *State v. Carmichael*, 62 M 159, 204 P 362; *State v. Kacar*, 74 M 269, 240 P 365; *State v. Smart*, 81 M 145, 155, 262 P 158.

Criminal Law \S 1092 (1-18).

24 C.J.S. Criminal Law $\S\S$ 1755-1757, 1759-1762.

3 Am. Jur. 267, Appeal and Error, $\S\S$ 667 et seq.

94-7508. (12045) Record on appeal in criminal cases. The record on appeal in a criminal case shall consist of the judgment roll as defined in section 94-7820, a copy of the notice of appeal and all bills of exceptions settled and filed in the case. Whenever a motion for a new trial has been made and overruled, the party appealing from the judgment shall, in lieu of a bill of exceptions, be permitted to use a transcript of the minutes of the court prepared and certified in the same manner as provided by section 93-5608, governing civil practice, or he may prepare and have settled a bill of exceptions in the manner provided by the preceding section.

History: En. Sec. 2, Ch. 34, L. 1903; re-en. Sec. 9347, Rev. C. 1907; amd. Sec. 16, Ch. 225, L. 1921; re-en. Sec. 12045, R. C. M. 1921.

Operation and Effect

There is not any such thing recognized by the law of this state as a statement on motion for a new trial in a criminal case. *State v. Kremer*, 34 M 6, 8, 85 P 736.

Id. The only manner of reviewing an order granting or refusing a new trial in a criminal case is upon a bill of exceptions incorporating the matters upon which it is based.

Where the state appeals from an order sustaining a demurrer to an information, it must present the information, with the demurrer and the trial court's ruling thereon, in a bill of exceptions duly settled and allowed, else the supreme court is without jurisdiction to entertain the appeal. *State v. Libby Yards*, 58 M 444, 193 P 394.

On appeal by the state in a criminal cause from an order granting defendant

a new trial, the affidavits used on the motion must, under this section, be incorporated in a bill of exceptions; if not so presented, the supreme court is without jurisdiction to review the order. *State v. Carmichael*, 62 M 159, 161, 204 P 362.

References

Cited or applied as section 2, chapter 34, Laws of 1903, in *State v. Stickney*, 29 M 523, 526, 75 P 201; as section 9347, Revised Codes, in *State v. Lewis*, 52 M 495, 501, 159 P 415; *State v. Brantingham*, 66 M 1, 7, 212 P 499; *State v. Nilan et al.*, 75 M 397, 400, 243 P 1081; *State v. Kepler et al.*, 77 M 307, 314, 250 P 603; *State v. Dixon*, 80 M 181, 213, 260 P 138; *State v. Vallie*, 82 M 456, 460, 268 P 493; *State v. Daw*, 99 M 232, 43 P 2d 240; *State v. Safeway Stores, Inc.*, 106 M 182, 197, 76 P 2d 81.

Criminal Law—1088 (1-20).

24 C.J.S. Criminal Law §§ 1741-1750, 1779.

3 Am. Jur. 209, Appeal and Error, §§ 567 et seq.

CHAPTER 76

NEW TRIALS

- Section 94-7601. New trial defined.
 94-7602. Its effect.
 94-7603. Grounds for granting new trial.
 94-7604. Applications for, how made.
 94-7605. Motions for new trial, how made—hearing.

94-7601. (12046) New trial defined. A new trial is a re-examination of the issue in the same court, before another jury, after a verdict has been given.

History: En. Sec. 2190, Pen. C. 1895; re-en. Sec. 9348, Rev. C. 1907; re-en. Sec. 12046, R. C. M. 1921. Cal. Pen. C. Sec. 1179.

References

Cited or applied as section 2190, Penal Code, in *State v. Landry*, 29 M 218, 220,

74 P 418; *State v. Carmichael*, 62 M 159, 161, 204 P 362; *State v. Aus*, 105 M 82, 87, 69 P 2d 584.

Criminal Law—905.

23 C.J.S. Criminal Law § 1418.

39 Am. Jur. 33, New Trial, § 2.

94-7602. (12047) Its effect. The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment or information.

History: Ap. p. Sec. 352, p. 242, Cod. Stat. 1871; re-en. Sec. 352, 3d Div. Rev. Stat. 1879; re-en. Sec. 353, 3d Div. Comp. Stat. 1887; en. Sec. 2191, Pen. C. 1895; re-en. Sec. 9349, Rev. C. 1907; re-en. Sec. 12047, R. C. M. 1921. Cal. Pen. C. Sec. 1180.

Plea of Once in Jeopardy Properly Denied Where Granted New Trial

Where one convicted of crime is granted a new trial he is not placed in new

jeopardy by the second trial, but is in the same jeopardy he was in when the first trial was had. *State v. Aus*, 105 M 82, 86, 69 P 2d 584.

References

Cited or applied as section 2191, Penal Code, in *State v. O'Brien*, 19 M 6, 47 P 103.

Criminal Law—965.

23 C.J.S. Criminal Law § 1426.

94-7603. (12048) Grounds for granting new trial. When a verdict has been rendered against the defendant, the court may, upon his application, grant a new trial in the following cases only:

1. When the trial has been had in his absence, whether he be in custody or on bail, if the indictment or information is for a felony.

2. When the jury has received out of court any evidence other than that resulting from a view of the premises, or any communication, document or paper referring to the case.

3. When the jury has separated without leave of the court, after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented.

4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors, which may be shown as provided in the code of civil procedure.

5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial.

6. When the verdict is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof or of a lesser crime included therein, the court may modify the judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed.

7. When new evidence is discovered material to the defendant and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable.

History: Ap. p. Sec. 353, p. 242, Cod. Stat. 1871; re-en. Sec. 353, 3d Div. Rev. Stat. 1879; amd. Sec. 1, p. 43, L. 1881; re-en. Sec. 354, 3d Div. Comp. Stat. 1887; en. Sec. 2192, Pen. C. 1895; re-en. Sec. 9350, Rev. C. 1907; re-en. Sec. 12048, R. C. M. 1921; amd. Sec. 1, Ch. 150, L. 1931. Cal. Pen. C. Sec. 1181.

Cross-Reference

Error in instructions as ground for new trial, sec. 94-7201.

Subd. 2

Operation and Effect

Under a statute providing that a new trial shall be granted "when the jury has received any evidence, papers, or documents, not authorized by the court," the word "papers" refers to such written instruments as might be competent testimony when inspected by the court, and found to

be competent under the rules of evidence, and does not include newspapers; and the reception by the jury of newspapers containing comments on the case does not, in itself, vitiate the verdict. *State v. Jackson*, 9 M 508, 520, 24 P 213.

Exhibits introduced in evidence in a prosecution for murder which are sent to the jury during their retirement will not be considered as having been received out of court, where it is found on motion for new trial that counsel for defendant consented to their being taken to the jury room during their retirement. *State v. Allen*, 23 M 118, 57 P 725.

Subd. 3

Operation and Effect

Under a statute providing that a new trial shall be granted "when the jury has been separated without leave of court, or been guilty of any misconduct, tending

to prevent a fair and due consideration of the case," the reception by the jury of newspapers, containing comments on the trial adverse to the defendant, is misconduct tending to show injury to the defendant. *State v. Jackson*, 9 M 508, 522, 24 P 213. See also *State v. Pepo*, 23 M 473, 479, 59 P 721.

The affidavits of two jurors, filed in aid of a motion for new trial by defendant in a prosecution for murder, in which both stated that they had misunderstood the instructions of the court, which clearly charged the jury that they could find the accused guilty of any grade of unlawful homicide or acquit him, in that from a reading of them they were under the impression that the jury was required to either find the defendant guilty of murder in the first degree or acquit him, and that, being unwilling to acquit, they voted for murder in the first degree rather than declare him innocent, did not show such misconduct on the part of the jury as to entitle defendant to a new trial. *State v. Beesskove*, 34 M 41, 51, 85 P 376.

Subd. 4

Operation and Effect

The fact that a juror, when sworn, was biased and prejudiced against the defendant, which fact he concealed upon his voir dire examination, and which neither defendant nor his counsel discovered until after verdict, was ground for a new trial under this section. *State v. Mott*, 29 M 292, 295, 74 P 728.

Id. While it is imperative that the accused shall have a trial by an impartial jury, nevertheless, after verdict, error will not be presumed, and it is incumbent on the accused to make it appear affirmatively that he is entitled to a new trial by reason of having been deprived of this constitutional right; mere possibility, or even probability, that one of the jurors was incompetent, is not sufficient to overthrow the verdict.

The fact that jurors may impeach their own verdict when it has been decided by lot under this section, excludes all other exceptions to the general rule that jurors will not be heard to impeach their own verdict. *State v. Beesskove*, 34 M 41, 51, 85 P 376; *State v. O'Brien*, 35 M 482, 503, 90 P 514; *State v. Lowry*, 39 M 462, 471, 104 P 545; *State v. Wakely*, 43 M 427, 437, 117 P 95; *State v. Lewis*, 52 M 495, 504, 159 P 415.

Except in cases where it has been reached by means other than a fair expression of opinion by all the jurors, their verdict cannot be impeached by the affidavit of one or more of the individuals composing the jury. *State v. Lewis*, 52 M 495, 504, 159 P 415.

Subd. 6

Operation and Effect

The expression, "the verdict is contrary to the evidence," has been held to mean the same thing as the expression, "insufficiency of the evidence to justify the verdict." *Flaherty v. Butte Electric Ry. Co.*, 42 M 89, 93, 111 P 348; *State v. Schoenborn*, 55 M 517, 520, 189 P 294.

A defendant in a criminal case who has been convicted is not required to show an entire absence of evidence of some fact necessary to make out a case, in order to secure a new trial; but if he can convince the district court that the evidence in its entirety is insufficient in weight to justify the verdict, he is entitled to a new trial. *State v. Schoenborn*, 55 M 517, 520, 189 P 294.

Id. The district court has authority to grant a motion for a new trial upon the ground that the verdict is contrary to the evidence without reference to the fact that a different judge may preside at the hearing of the motion, from the one who presided at the trial.

A motion for a new trial in a criminal case upon the ground that the verdict is contrary to the law and the evidence presents for the court's determination the question of the sufficiency of the evidence to sustain the verdict. *State v. Hughes et al.*, 76 M 421, 424, 246 P 959.

Failure of defendant to object to instructions on first degree murder does not deprive him of the right to ask for a new trial on the ground that the evidence did not justify a verdict of murder in that degree, the expression in this section authorizing a new trial "when the verdict is contrary to the evidence" meaning the same thing as insufficiency of the evidence to justify the verdict, and the section not contemplating that defendant must first make objection to such instructions before he may rely upon the insufficiency of the evidence as a ground for a new trial. *State v. Gunn*, 85 M 553, 561, 281 P 757.

Subd. 7

Operation and Effect

A new trial will not be granted on the ground of newly discovered evidence when the persons from whom the evidence is expected to decline to make affidavits that they can give it. *State v. Gaimos*, 53 M 118, 128, 162 P 596.

An affidavit of one of defendant's attorneys in support of a motion for new trial asked because of newly discovered evidence, to the effect that he could not with reasonable diligence have discovered the affidavits of five persons who claimed to have been present at the place where the alleged assault occurred and whose

testimony would tend to contradict the state's witnesses or corroborate appellant's version of the affray "and presented same upon the trial," was insufficient to show abuse of the court's discretion in denying the motion. *State v. Prlja*, 57 M 461, 189 P 64.

An affidavit in support of a motion for a new trial following a conviction for attempted rape that the prosecuting witness, some five months before the trial, said to affiant that, if defendant didn't "fork over," she "would send him over the road for the rest of his life," was not "newly discovered evidence" within the meaning of this section, that expression meaning evidence discovered since the trial. *State v. Prouty*, 60 M 310, 315, 199 P 281.

Id. Failure of defendant to show by his own affidavit that alleged newly discovered evidence was not known to him at the time of the trial warrants refusal to grant a retrial, affidavits of others in that regard being, as a general rule, insufficient.

Though a motion for a new trial in a criminal cause on the ground of newly discovered evidence is not generally viewed with favor by the courts, it is authorized by the Codes, and, when the prescribed conditions are met, entitled to the same consideration as a motion upon any other statutory ground, and while a broad discretion is lodged in the trial court in disposing of it, its order denying it is subject to review. *State v. Gangner*, 73 M 187, 190, 235 P 703.

Alleged newly discovered evidence which is cumulative only does not warrant the granting of a new trial; nor may the court be put in error for refusing a retrial on that ground where movant made no attempt to show due diligence on his part to produce the newly discovered witness on the trial of his case. *State v. Gies*, 77 M 62, 64, 249 P 573.

Where the owner of an animal, with the theft of which defendant was charged, at the trial testified that it was his property at the time it was taken and remained so until after defendant's arrest when it was paid for by the latter, he being fully cross-examined as to the transaction, a motion for a new trial on the ground of newly discovered evidence based upon the witness' affidavit to the effect that he was mistaken in so testifying, was properly refused, since a new trial will not be granted because of newly discovered evidence based on forgetfulness or unfamiliarity of defendant's counsel with facts within the knowledge of the witness, or to enable the witness, on a change of heart, to give testimony in excuse of defendant's conduct. *State v. Hughes et al.*, 78 M 87, 89, 252 P 320.

Where no evidence of the fitness or unfitness of the parents of an accused delinquent minor to control or take care of him was heard by the court, a judgment that they were not unfit was unsupported by the evidence and refusal of a new trial on the ground of new evidence was error. *State ex rel. Palagi v. Freeman et al.*, 81 M 132, 139, 262 P 168.

Where defendant and his counsel accepted the statement of the county attorney that a witness whose name was indorsed on the information, then in the county jail, had refused to testify, whereas after the trial they ascertained that if he had been called he would have testified that he and another committed the offense for which defendant was convicted, without verifying the prosecutor's statement by an interview with the witness, they were lacking in due diligence in discovering and producing the alleged newly discovered evidence, preventing reversal of the order denying retrial as an abuse of discretion. *State v. Broell*, 87 M 284, 287, 286 P 1108.

Id. Applications for new trials on the ground of newly discovered evidence are not favored by the courts and will not be granted where the new evidence is merely cumulative; in passing upon the correctness of a new trial order the supreme court sits only as a reviewing tribunal, not as a court of original jurisdiction or one clothed with authority to try the motion *de novo*.

Where newly discovered evidence may demonstrate perjury in the state's witness upon whose evidence the verdict of guilty was founded and, but for which, conviction could not have been had, and may probably produce a different result, a new trial should be granted on that ground. *State v. Hamilton*, 87 M 353, 368, 287 P 933.

Id. Motions for new trials on the ground of newly discovered evidence in criminal cases are not favored, and, regardless of the facts set up in affidavits filed in support thereof, defendant is not entitled to a retrial unless it is shown that he could not, with reasonable diligence, have discovered and produced the new evidence at the trial.

Id. To constitute a showing of due diligence in discovering new evidence in a criminal case to warrant the granting of a new trial, movant is not required to allege in his supporting affidavits that he made inquiry of every person residing in the town in which the crime of which he was convicted was committed, some seventy-five miles from the county seat, by telephone or telegraph, as to whether they knew anything concerning the case.

Constitutionality

This statute is not unconstitutional as

not granting to the accused in a criminal prosecution a "trial by an impartial jury." *State v. Mott*, 29 M 292, 300, 74 P 728.

On Confession of Error by Attorney General

Conviction of one of the crime of first degree burglary set aside and cause remanded for new trial for error committed by the trial court, confessed by the attorney general and shown by the record, in refusing defendant's motion for retrial based on the ground that a juror was biased and prejudiced. *State v. Summers*, 107 M 34, 36, 79 P 2d 560.

Operation in General

Where a motion to set aside an information was made in the trial court, on the ground that it was not properly subscribed by the county attorney, and improperly refused, the error can be reviewed only on appeal from the judgment; it cannot be reviewed on an appeal from an order granting a new trial, not being one of the grounds for new trial enumerated in this section. *State v. Schnepel*, 23 M 523, 528, 59 P 927.

Id. The failure of the county attorney or the attorney prosecuting to properly subscribe the information is not ground for a new trial.

Upon appeal from an order granting or denying a motion for a new trial, the supreme court sits as a court of error and review, not as a court of original jurisdiction, or as an appellate court that is clothed with authority to try the motion *de novo*. *State v. Schoenborn*, 55 M 517, 520, 179 P 294.

94-7604. (12049) Applications for, how made. The application for a new trial must be made upon written notice of motion, and, if based upon any of the grounds mentioned in the subdivisions 2, 3, 4, and 7, of the preceding section, such written notice of motion must be filed within thirty days after the discovery of the facts upon which the party relies in support of his motion; in all other cases notice of motion must be filed within ten days after the rendition of the verdict.

History: En. Sec. 1, p. 43, L. 1881; re-en. Sec. 353, 3d Div. Comp. Stat. 1887; amd. Sec. 2193, Pen. C. 1895; re-en. Sec. 3951, Rev. C. 1907; re-en. Sec. 12049, R. C. M. 1921.

Operation and Effect

A supplemental motion for a new trial on the ground of newly discovered evidence is timely and properly before the court if made while the original motion

Rulings upon the admission or rejection of testimony and upon giving or refusing instructions may be reviewed either upon appeal from the judgment or on appeal from an order refusing a new trial, but any other questions arising from this section may be reviewed only upon appeal from an order denying a new trial. *State v. Brantingham*, 66 M 1, 7, 8, 212 P 499.

Where a defendant convicted of crime bases his motion for a new trial upon a number of the statutory grounds therefor, he has an absolute right to have all the grounds specified passed upon by the trial court; if it fails to do so but grants a new trial upon a ground not sustained on appeal by the state, the order will be reversed with directions to pass upon the motion in its entirety. *State v. Hughes et al.*, 76 M 421, 424, 246 P 959.

References

Cited or applied as section 2192, Penal Code, in *State v. Gawith*, 19 M 48, 47 P 207; *Sutton v. Lowry*, 39 M 462, 471, 104 P 545; *Brunnabend v. Tibbles*, 76 M 288, 299, 246 P 536; *State v. Le Due*, 89 M 545, 581, 582, 300 P 919; *Hough v. Shishkowsky*, 99 M 28, 43 P 2d 247.

Criminal Law—913 (1) et seq.

23 C.J.S. Criminal Law § 1427 et seq.

39 Am. Jur. 50, New Trial, §§ 26 et seq.

New trial on ground of newly discovered evidence which court has jurisdiction to determine motion for, pending appeal or after affirmance of conviction. 27 ALR 1091.

remains undetermined when the applicant shows by affidavit that it was filed within thirty days after discovery of the alleged new evidence. *State v. Hughes et al.*, 78 M 87, 89, 252 P 320.

Criminal Law—949 (1-3).

23 C.J.S. Criminal Law §§ 1467-1469, 1473, 1474.

39 Am. Jur. 181, New Trial, §§ 177 et seq.

94-7605. (12050) Motions for new trial, how made—hearing. A motion for a new trial, if made for any of the causes mentioned in the first, second, third, fourth, or seventh subdivision of section 94-7603, must be made

upon affidavits which must be filed at the same time as the notice of motion or within such further time, not exceeding thirty days thereafter, as may be allowed by the court or judge; in all other cases the motion must be made upon the minutes of the court. The official stenographic report of trials may be referred to as a part of the minutes of the court. The notice of motion must designate the grounds upon which the motion will be made. A motion for new trial must be heard upon the second day after notice is filed, or as soon as practicable thereafter, and in all cases the court or judge may, in his discretion, make an order staying further proceedings in the case until such motion is disposed of.

History: En. Sec. 1, p. 43, L. 1881; re-en. Sec. 356, 3d Div. Comp. Stat. 1887; amd. Sec. 2194, Pen. C. 1895; re-en. Sec. 9352, Rev. C. 1907; amd. Sec. 17, Ch. 225, L. 1921; re-en. Sec. 12050, R. C. M. 1921.

Operation and Effect

An alleged error in an instruction will not be reviewed on appeal where the only ground designated is that the verdict is contrary to law and evidence. *State v. Gawith*, 19 M 48, 47 P 207.

The notice of motion for a new trial in a criminal case need not state whether the motion will be based on affidavits or a bill of exceptions; and the statement therein of the grounds on which the motion will be made is notice of what will be the basis of the motion. *State v. Landry*, 29 M 218, 220, 74 P 418.

When Assignment of Error Does Not Merit Consideration—No Record, Not Argued

Where alleged error in denying defendant's motion for new trial was not argued and nothing appeared in the record to sustain it, the assignment does not merit consideration. *State v. Wong Sun*, 114 M 185, 199, 133 P 2d 761.

References

Cited or applied as section 2194, Penal Code, in *State v. Shadwell*, 22 M 559, 57 P 281; *State ex rel. Bottomly v. District Court*, 73 M 541, 548, 237 P 525.

Criminal Law—953, 956 (1), 959.

23 C.J.S. Criminal Law §§ 1470, 1479, 1483, 1486, 1487, 1491, 1492, 1493, 1497, 1499, 1501, 1502, 1507, 1513.

39 Am. Jur. 187, New Trial, §§ 186 et seq.

CHAPTER 77

ARREST OF JUDGMENT

- Section 94-7701. Motion in arrest of judgment.
 94-7702. Court may arrest judgment without motion.
 94-7703. Effect of arresting judgment.
 94-7704. Defendant, when to be held or discharged.

94-7701. (12051) Motion in arrest of judgment. A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant, on a plea of a former conviction or acquittal. It may be founded on any of the defects in the indictment or information mentioned in section 94-6703, unless the objection has been waived by a failure to demur, and must be made before or at the time the defendant is called for judgment.

History: Ap. p. Sec. 238, p. 253, *Bannack Stat.*; re-en. Sec. 356, p. 243, *Cod. Stat.* 1871; re-en. Sec. 356, 3d Div. Rev. Stat. 1879; re-en. Sec. 357, 3d Div. Comp. Stat. 1887; en. Sec. 2200, Pen. C. 1895; re-en. Sec. 9353, Rev. C. 1907; re-en. Sec. 12051, R. C. M. 1921. *Cal. Pen. C. Sec. 1185.*

Operation and Effect

The defendant in a criminal proceeding will be deemed to have waived any ob-

jection to the manner in which prior convictions had been pleaded in the information, where it does not appear from the record by bill of exceptions that any demurrer to the information had been interposed. *State v. Gordon*, 35 M 458, 463, 90 P 173.

A motion in arrest of judgment must be founded on some defect in the information, and extrinsic evidence cannot be received at a hearing of such motion. *State v.*

Tully, 31 M 365, 371, 78 P 760. See State v. Van, 44 M 374, 383, 120 P 479; State v. Caterni, 54 M 456, 458, 171 P 284.

A motion in arrest lies only for certain defects appearing on the face of the indictment or information, not waived by failure to demur. State v. Caterni, 54 M 456, 458, 171 P 284.

Id. Resort to evidence extrinsic to the information to show that it does not accurately state the facts is not permissible on motion in arrest.

The motion in arrest of judgment challenges the jurisdiction of the state to enact, and of the court to enforce, the act under consideration. That question was raised, elaborated upon and decided against the contention here made in State v. Kahn, 56 M 108, 182 P 107; State v. Schaffer, 59 M 463, 467, 197 P 986.

A motion in arrest of judgment lies only

for certain defects on the face of the information not waived by failure to demur; hence where there was no demurrer filed and the information was sufficient, assignment of error that the trial court erred in denying the motion need not be considered. State v. Wong Sun, 114 M 185, 199, 133 P 2d 761.

References

Cited or applied as section 2200, Penal Code, in State v. Mahoney, 24 M 281, 285, 61 P 647; State v. Mjelde, 29 M 490, 75 P 87; as section 9353, Revised Codes, in State v. Kanakaris, 54 M 180, 183, 169 P 42; State v. Wehr, 57 M 469, 474, 188 P 930.

Criminal LawⒸ968 (1), 970 (1).

23 C.J.S. Criminal Law §§ 1517, 1542, 1544.

15 Am. Jur. 98, Criminal Law, §§ 434-441.

94-7702. (12052) Court may arrest judgment without motion. The court may also, on its own view of any of these defects, arrest the judgment without motion.

History: En. Sec. 239, p. 253, Bannack Stat.; re-en. Sec. 357, p. 243, Cod. Stat. 1871; re-en. Sec. 357, 3d Div. Rev. Stat. 1879; re-en. Sec. 358, 3d Div. Comp. Stat. 1887; en. Sec. 2201, Pen. C. 1895; re-en. Sec. 9354, Rev. C. 1907; re-en. Sec. 12052, R. C. M. 1921. Cal. Pen. C. Sec. 1186.

References

Cited or applied as section 9354, Revised Codes, in State v. Wehr, 57 M 469, 476, 188 P 930.

Criminal LawⒸ966.

23 C.J.S. Criminal Law § 1514.

94-7703. (12053) Effect of arresting judgment. The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which he was before the indictment was found or information filed.

History: En. Sec. 240, p. 253, Bannack Stat.; re-en. Sec. 358, p. 243, Cod. Stat. 1871; re-en. Sec. 358, 3d Div. Rev. Stat. 1879; re-en. Sec. 359, 3d Div. Comp. Stat. 1887; amd. Sec. 2202, Pen. C. 1895; re-en.

Sec. 9355, Rev. C. 1907; re-en. Sec. 12053, R. C. M. 1921. Cal. Pen. C. Sec. 1187.

Criminal LawⒸ976.

23 C.J.S. Criminal Law §§ 1554, 1555.

15 Am. Jur. 102, Criminal Law, § 441.

94-7704. (12054) Defendant, when to be held or discharged. If, from the evidence on the trial, there is reason to believe the defendant guilty, and a new indictment or information can be framed upon which he may be convicted, the court may order him to be recommitted to the officer of the proper county, or admitted to bail anew, to answer the new indictment or information. If the evidence shows him guilty of another offense, he must be committed or held thereon, and in neither case shall the verdict be a bar to another prosecution. But if no evidence appears sufficient to charge him with any offense, he must, if in custody, be discharged; or if admitted to bail, his bail must be exonerated; or if money has been deposited instead of bail, it must be refunded to the defendant; and the arrest of judgment shall operate as an acquittal of the charge upon which the indictment or information was founded.

History: En. Sec. 2203, Pen. C. 1895; re-en. Sec. 9356, Rev. C. 1907; re-en. Sec. 12054, R. C. M. 1921. Cal. Pen. C. Sec. 1188.

BailⒸ73, 74 (1); Criminal LawⒸ976.

8 C.J.S. Bail §§ 52, 53, 76; 23 C.J.S.

Criminal Law §§ 1554, 1555.

CHAPTER 78

JUDGMENT—SUSPENSION OF SENTENCE AND PROBATION

- Section 94-7801. Appointing time for judgment.
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94-7801. (12055) Appointing time for judgment. After a plea or verdict of guilty, or after a verdict against the defendant on the plea of a former conviction or acquittal, if the judgment be not arrested or a new trial granted, the court must appoint a time for pronouncing judgment, which, in cases of felony, must be at least two days after the verdict, if the court intend to remain in session so long; but if not, then at as remote a time as can reasonably be allowed.

History: Ap. p. Sec. 360, p. 244, Cod. Stat. 1871; re-en. Sec. 360, 3d Div. Rev. Stat. 1879; re-en. Sec. 361, 3d Div. Comp. Stat. 1887; en. Sec. 2210, Pen. C. 1895; re-en. Sec. 9357, Rev. C. 1907; re-en. Sec. 12055, R. C. M. 1921. Cal. Pen. C. Sec. 1191.

Delay Due to Motions of Defendant; Nonprejudice

While ordinarily the trial court in a criminal case should pass judgment without delay, other than that provided by this section, and in the absence of statute declaring that sentence must be pronounced at the same term of court at which the verdict of guilty is returned; where the verdict was returned on Nov. 18, 1938, and sentence was not pronounced until Jan. 19, 1939, the delay being caused by defendant's motions in arrest of judgment and for new trial and the hearings thereof,

complaint may not be made that the court lost jurisdiction, or judgment not pronounced in the trial term. *State v. Heaston*, 109 M 303, 309, 97 P 2d 330.

Operation and Effect

This section means that the defendant is entitled to two days after the verdict is returned before judgment is pronounced, provided the term of court lasts that long; but, if the term is not to continue for two days after the verdict is returned, then the time for pronouncing judgment shall be postponed to a date as remote as can reasonably be fixed within the then current term of court. *State v. Lu Sing*, 34 M 31, 40, 85 P 521.

Id. When two days did not intervene between the rendition of a verdict of guilty in a capital case, and the pronouncement of judgment, it will be presumed on

appeal, in the absence of anything in the record to the contrary, that the court did not remain in session after the date on which the judgment was pronounced.

Method pursued by trial judge, in passing sentence and rendering judgment in a prosecution for illegally manufacturing and illegally possessing intoxicating liquor where defendant was guilty upon both counts and waived the statutory time for pronouncing judgment and sentence, examined, held to have been in faultless adherence to the provisions of the Code sections and not open to the objection that no judgment was ever made or en-

tered and all that was done was an entry by the clerk in the minute book that the court did certain things. *State v. Sorenson*, 75 M 30, 34, 241 P 616.

References

Cited or applied as section 9357, Revised Codes, in *Hosoda v. Neville*, 45 M 310, 312, 123 P 20. *State v. Simanton*, 100 M 292, 311, 49 P 2d 981.

Criminal LawⒸ977 (3).

24 C.J.S. Criminal Law § 1564.

Judgment and sentence, generally, 15 Am. Jur. 102, Criminal Law, §§ 442-504.

94-7802. (12056) Upon plea of guilty, court must determine degree.

Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree.

History: En. Sec. 2211, Pen. C. 1895; re-en. Sec. 9358, Rev. C. 1907; re-en. Sec. 12056, R. C. M. 1921. Cal. Pen. C. Sec. 1192.

Operation and Effect

In the absence of testimony, it will be presumed on appeal that the trial court, in a burglary case, had evidence before it justifying a finding that, if guilty at all, the defendant was guilty of an attempt to commit burglary in the nighttime, which constitutes the first degree of the offense, and that the punishment inflicted was proper. *State v. Mish*, 36 M 168, 175, 92 P 459.

Where the judgment was silent as to

the degree of burglary of which defendant was convicted and the sentence imposed was such as might be imposed for first degree burglary only, supreme court would presume, where no appeal was taken, that the court ascertained that defendant was guilty of burglary in the first degree. *State ex rel. Williams v. Henry*, — M —, 174 P 2d 220, 222.

Id. A judgment is not rendered invalid for failure to state the degree of the crime for which defendant was convicted.

Criminal LawⒸ980 (2).

24 C.J.S. Criminal Law § 1563.

15 Am. Jur. 108, Criminal Law, § 447.

94-7803. (12057) Presence of defendant. For the purpose of judgment, if the conviction is for felony, the defendant must be personally present; if for a misdemeanor, judgment may be pronounced in his absence.

History: En. Sec. 362, p. 244, Cod. Stat. 1871; re-en. Sec. 362, 3d Div. Rev. Stat. 1879; re-en. Sec. 363, 3d Div. Comp. Stat. 1887; amd. Sec. 2212, Pen. C. 1895; re-en. Sec. 9359, Rev. C. 1907; re-en. Sec. 12057, R. C. M. 1921. Cal. Pen. C. Sec. 1193.

Criminal LawⒸ987.

24 C.J.S. Criminal Law § 1574.

15 Am. Jur. 113, Criminal Law, §§ 455, 456.

94-7804. (12058) Defendant in custody, how brought for judgment. When the defendant is in custody, the court may direct the officer in whose custody he is to bring him before it for judgment, and the officer must do so.

History: En. Sec. 208, p. 249, Bannack Stat.; re-en. Sec. 363, p. 244, Cod. Stat. 1871; re-en. Sec. 363, 3d Div. Rev. Stat. 1879; re-en. Sec. 364, 3d Div. Comp. Stat.

1887; amd. Sec. 2213, Pen. C. 1895; re-en. Sec. 9360, Rev. C. 1907; re-en. Sec. 12058, R. C. M. 1921. Cal. Pen. C. Sec. 1194.

94-7805. (12059) How brought before the court when on bail. If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or of the money deposited, may direct the clerk to issue a warrant for his arrest.

History: En. Sec. 2214, Pen. C. 1895; re-en. Sec. 9361, Rev. C. 1907; re-en. Sec. 12059, R. C. M. 1921. Cal. Pen. C. Sec. 1195.

94-7806. (12060) **Bench warrant to issue.** The clerk, on the application of the county attorney, may, at any time after the order, whether court be sitting or not, issue a warrant into one or more counties.

History: En. Sec. 2215, Pen. C. 1895;
re-en. Sec. 9362, Rev. C. 1907; re-en. Sec.
12060, R. C. M. 1921. Cal. Pen. C. Sec. 1196.

94-7807. (12061) **Form of bench warrant.** The warrant must be substantially in the following form: "..... district, in and for the county of The state of Montana, to any sheriff, constable, marshal, or policeman in this state: A B, having been on the day of, A. D. nineteen hundred and, duly convicted in the district court of the county of, of the crime of (designating it generally), you are therefore commanded forthwith to arrest the above-named A B, and bring him before that court for judgment. Given under my hand, with the seal of said court affixed, this day of, A. D. nineteen hundred and By order of the court.

(Seal)

E F, Clerk."

History: En. Sec. 2216, Pen. C. 1895;
re-en. Sec. 9363, Rev. C. 1907; re-en. Sec.
12061, R. C. M. 1921. Cal. Pen. C. Sec. 1197.

94-7808. (12062) **Warrant, how served.** The warrant may be served in any county in the same manner as a warrant of arrest, except that when served in another county it need not be indorsed by the magistrate of that county.

History: En. Sec. 2217, Pen. C. 1895;
re-en. Sec. 9364, Rev. C. 1907; re-en. Sec.
12062, R. C. M. 1921. Cal. Pen. C. Sec. 1198.

94-7809. (12063) **Arrest of defendant.** Whether the warrant is served in the county in which it was issued or in another county, the officer must arrest the defendant and bring him before the court, or commit him to the officer mentioned in the warrant, according to the command thereof.

History: En. Sec. 2218, Pen. C. 1895;
re-en. Sec. 9365, Rev. C. 1907; re-en. Sec.
12063, R. C. M. 1921. Cal. Pen. C. Sec. 1199.

94-7810. (12064) **Arraignment of defendant for judgment.** When the defendant appears for judgment, he must be informed by the court, or by the clerk, under its direction, of the nature of the charge against him, and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him.

History: Ap. p. Sec. 210, p. 249, Ban-
nack Stat.; re-en. Sec. 365, p. 245, Cod.
Stat. 1871; re-en. Sec. 365, 3d Div. Rev.
Stat. 1879; re-en. Sec. 366, 3d Div. Comp.
Stat. 1887; en. Sec. 2219, Pen. C. 1895;
re-en. Sec. 9366, Rev. C. 1907; re-en. Sec.
12064, R. C. M. 1921. Cal. Pen. C. Sec. 1200.

References

State v. Sorenson, 75 M 30, 35, 241 P 616.

Criminal Law 989.

24 C.J.S. Criminal Law § 1576.

94-7811. (12065) **What cause may be shown against the judgment.** He may show, for cause against the judgment—

1. That he is insane; and if, in the opinion of the court, there is reasonable ground for believing him to be insane, the question of insanity must be tried as provided in sections 94-9301 to 94-9307. If, upon trial of that question, the jury find that he is sane, judgment must be pronounced, but if they find him insane, he must be committed to the state insane asylum until he becomes sane; and when notice is given of that fact, as provided in section 94-9306, he must be brought before the court for judgment.

2. That he has good cause to offer, either in arrest of judgment or for a new trial; in which case the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon a motion in arrest of judgment or for a new trial.

History: En. Sec. 2220, Pen. C. 1895; re-en. Sec. 9367, Rev. C. 1907; re-en. Sec. 12065, R. C. M. 1921. Cal. Pen. C. Sec. 1201.

94-7812. (12066) **If no cause shown, judgment to be pronounced.** If no sufficient cause is alleged or appears to the court why judgment should not be pronounced, it must thereupon be rendered.

History: En. Sec. 211, p. 249, Bannack Stat.; re-en. Sec. 366, p. 245, Cod. Stat. 1871; re-en. Sec. 366, 3d Div. Rev. Stat. 1879; re-en. Sec. 367, 3d Div. Comp. Stat. 1887; re-en. Sec. 2221, Pen. C. 1895; re-en. Sec. 9368, Rev. C. 1907; re-en. Sec. 12066, R. C. M. 1921. Cal. Pen. C. Sec. 1202.

References

State v. Sorenson, 75 M 30, 35, 241 P 616; State v. Simanton, 100 M 292, 311, 49 P 2d 981; State v. Heaston, 109 M 303, 309, 97 P 2d 330.

94-7813. (12067) **Circumstances in aggravation or mitigation of punishment.** After a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the oral suggestion of either party that there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct.

History: En. Sec. 2222, Pen. C. 1895; re-en. Sec. 9369, Rev. C. 1907; re-en. Sec. 12067, R. C. M. 1921. Cal. Pen. C. Sec. 1203.

Criminal Law §986.

24 C.J.S. Criminal Law § 1575.

94-7814. (12068) **Testimony, how presented.** The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of punishment, except as provided in this and preceding section.

History: En. Sec. 2223, Pen. C. 1895; re-en. Sec. 9370, Rev. C. 1907; re-en. Sec. 12068, R. C. M. 1921. Cal. Pen. C. Sec. 1204.

94-7815. (12069) **Duration of imprisonment on judgment to pay a fine.** A judgment that the defendant pay a fine and costs may also direct that he be imprisoned until both fine and costs are satisfied, specifying the extent of the imprisonment, which must not exceed one day for every two dollars of the fine and costs.

History: Ap. p. Sec. 212, p. 249, *Ban-nack Stat.*; re-en. Sec. 367, p. 245, *Cod. Stat.* 1871; re-en. Sec. 367, 3d Div. *Rev. Stat.* 1879; re-en. Sec. 368, 3d Div. *Comp. Stat.* 1887; en. Sec. 2224, *Pen. C.* 1895; re-en. Sec. 9371, *Rev. C.* 1907; re-en. Sec. 12069, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 1205.

Operation and Effect

A judgment in a case of misdemeanor, imposing a fine of \$500, and providing that in default of payment the defendant be imprisoned "for the term of one day for each \$2 of said fine," is sufficiently definite and certain to meet the requirements of this section. *State ex rel. Poindexter v. District Court*, 51 M 186, 149 P 958.

Id. This section held applicable to a case where a fine only is the penalty imposed.

The district court has the power, under this section, to impose a sentence of imprisonment in the county jail for a certain number of days, defendant in addition to pay a fine in a stated amount, and, in default of payment, to stand committed one day for every two dollars of the fine after

expiration of the term of imprisonment, until the fine is paid. *In re Londres*, 54 M 418, 170 P 1045.

A judgment that defendant convicted on three counts of the information charging violations of the liquor law pay a fine of \$200 and serve sixty days in the county jail on each count, and that if the fines be not paid, he serve them out at the rate of one day for each two dollars of the fines, held not uncertain or ambiguous, it meaning that he be imprisoned for a total of 180 days, and serve one day for each two dollars of the fines aggregating \$600. *In re Pyle*, 72 M 494, 498, 234 P 254.

References

Cited or applied as section 2224, *Penal Code*, in *In re Boyle*, 26 M 365, 366, 68 P 409, 68 P 471; *State v. Towner*, 26 M 339, 345, 67 P 1004.

Criminal Law—995 (5).

24 C.J.S. *Criminal Law* § 1600.

15 Am. Jur. 182, *Criminal Law*, §§ 543, 544.

94-7816. (12070) Prosecutor to pay costs. A judgment that the prosecutor pay the costs may be rendered in cases provided for in this code and execution may issue thereon as in other cases.

History: En. Sec. 2225, *Pen. C.* 1895; re-en. Sec. 9372, *Rev. C.* 1907; re-en. Sec. 12070, *R. C. M.* 1921.

References

Cited or applied as section 2225, *Penal Code*, in *State v. Towner*, 26 M 339, 346,

Costs—316.

20 C.J.S. *Costs* § 447.

94-7817. (12071) Discharge of pauper prisoner. When judgment of fine and costs is entered against a defendant, and it is ordered that he be committed until the same are paid, if at any time thereafter the defendant prove to the court, or judge thereof, by his own affidavit or that of any other person, that he is unable to pay such fine and costs, or any part thereof, the court, or judge thereof, may order the sheriff to release him upon his having been confined in jail one day for every two dollars of such fine and costs, or any portion thereof remaining unpaid; but if the defendant do not prove to the satisfaction of the court, or judge thereof, that he is unable to pay such fine and costs, or any part thereof, he shall not be released from confinement, except as hereinafter provided, unless the sheriff has made the same upon execution out of his property.

History: En. Sec. 389, p. 248, *Cod. Stat.* 1871; re-en. Sec. 389, 3d Div. *Rev. Stat.* 1879; amd. Sec. 1, p. 32, *L.* 1883; re-en. Sec. 390, 3d Div. *Comp. Stat.* 1887; amd. Sec. 2226, *Pen. C.* 1895; re-en. Sec. 9373, *Rev. C.* 1907; re-en. Sec. 12071, *R. C. M.* 1921.

Operation and Effect

Where the record discloses that a judgment has been rendered under section

94-100-28, the justice of the peace is without authority to issue an execution provided for by this section even though it is applicable to some extent to practice in the justice courts. *Petelin v. Kennedy*, 29 M 466, 75 P 82.

References

Cited or applied as section 2226, *Penal Code*, in *State v. Towner*, 26 M 339, 346, 67 P 1004; as section 9373, *Revised Codes*,

in *State v. District Court et al.*, 51 M 186, 190, 149 P 958.

Fines \hookrightarrow 12.
36 C.J.S. Fines § 11.

94-7818. (12072) Discharge in other cases. Whenever any defendant is committed to jail for the failure to pay any fine and costs adjudged against him, and has failed to prove to the satisfaction of the court, or judge thereof, that he is unable to pay the same, or any part thereof, the court must order that he be discharged from custody when he has served one day for every two dollars of such fine and costs; but this does not discharge the judgment for fine and costs, which may, at any time thereafter within the time limited by law, be collected upon execution issued thereon.

History: En. Sec. 390, p. 248, Cod. Stat. 1871; re-en. Sec. 390, 3d Div. Rev. Stat. 1879; amd. Sec. 1, p. 33, L. 1883; re-en. Sec. 391, 3d Div. Comp. Stat. 1887; re-en. Sec. 2227, Pen. C. 1895; re-en. Sec. 9374, Rev. C. 1907; re-en. Sec. 12072, R. C. M. 1921.

References

Cited or applied as section 2227, Penal Code, in *State v. Towner*, 26 M 339, 346, 67 P 1004; *Petelin v. Kennedy*, 29 M 466, 75 P 82; as section 9374, Revised Codes, in *State v. District Court et al.*, 51 M 186, 189, 149 P 958.

94-7819. (12073) Judgment to pay fine constitutes a lien. A judgment that the defendant pay a fine or costs constitutes a lien upon the real estate of the defendant, which lien dates from the date of the defendant's arrest.

History: En. Sec. 2228, Pen. C. 1895; re-en. Sec. 9375, Rev. C. 1907; re-en. Sec. 12073, R. C. M. 1921. Cal. Pen. C. Sec. 1206.

References

Cited or applied as section 2228, Penal Code, in *State v. Towner*, 26 M 339, 346, 67 P 1004.

Operation and Effect

A former statute, containing substantially similar provisions, held constitutional. *Silver Bow County v. Strumbaugh*, 9 M 81, 22 P 453.

Fines \hookrightarrow 3.
36 C.J.S. Fines § 15.

94-7820. (12074) Entry of judgment and judgment roll. When judgment upon a conviction is rendered the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction (if one), and must, within five days, annex together and file the following papers, which will constitute the judgment roll:

1. The indictment or information, and a copy of the minutes of the plea or demurrer.
2. A copy of the minutes of the trial.
3. The charges given or refused, and the indorsements thereon.
4. A copy of the judgment.

History: En. Sec. 2229, Pen. C. 1895; re-en. Sec. 9376, Rev. C. 1907; amd. Sec. 18, Ch. 225, L. 1921; re-en. Sec. 12074, R. C. M. 1921. Cal. Pen. C. Sec. 1207.

a judgment and constituted the judgment. *State v. Thierfelder*, 114 M 104, 108, 132 P 2d 1035.

Operation and Effect

Copy of Order Constituting the Judgment

An appeal by the state in a criminal prosecution from an order made at the close of the state's case in chief, directing the jury to return a verdict in favor of defendant, appealable under sec. 94-8104, is not subject to dismissal on the ground that the record on appeal did not contain a copy of the judgment, required by this section, where it did contain a copy of the order which had all the attributes of

Under subdivision 1 of this section and section 94-7507, the original and first amended information, and demurrers to them which were sustained, and a motion to dismiss the prosecution, and order overruling it, were not part of the appeal record, where they were not embodied in the bill of exceptions. *State v. Stickney*, 29 M 523, 526, 75 P 201.

The "record of the action" in a criminal case, as defined in this section, cannot be

brought up on appeal in the body of a bill of exceptions. *State v. Morrison*, 34 M 75, 79, 85 P 738.

The merits of an appeal in a criminal case will not be considered where the papers constituting the record are included in a bill of exceptions and not certified as the record, nor identified in any way by the certificate of the clerk of the district court or the trial judge. *State v. Farriss*, 34 M 424, 425, 87 P 177.

Since there was no indeterminate sentence legislation at the time of this conviction, it was not necessary to state in the judgment the degree of burglary of which the defendant was convicted. *State v. Hill*, 46 M 24, 126 P 41.

The record on appeal in a criminal case must, among other things, contain the judgment roll in which must be included a copy of the judgment. The state, on the theory that an objection of defendant to the introduction of evidence on the ground of the insufficiency of the information is in effect a demurrer to the information and an order sustaining a demurrer constitutes the judgment, attempted to appeal from such an order as from the judgment, but the record did not contain a copy of the order in the form of a minute entry, which in such a case constitutes the judgment. Held, that the supreme court was without jurisdiction to entertain the appeal. *State v. Nilan et al.*, 75 M 397, 400, 243 P 1081.

Held, that while the trial court erred in permitting the state on a perjury trial to introduce the judgment roll in the cause in which the alleged false testimony was given, containing papers not properly part thereof under this section, the procedure

amounted to a mere irregularity which could not in any manner have prejudiced the defendant. *State v. Jackson*, 88 M 420, 429, 293 P 309.

Where Record on Appeal Contained Requirements

Record on appeal from an order sustaining a demurrer to the information, consisting of the information, demurrer and ruling thereon, notice of appeal, copy of minute entries and certificate of the clerk of court, held, sufficient as against contention that it should consist of a bill of exceptions duly settled; the record containing all that is required by this section, except instructions, none having been given; no exception being required to court's ruling on demurrer, bill of exceptions therefore idle act. *State v. Safeway Stores, Inc.*, 106 M 182, 197, 76 P 2d 81.

References

Cited or applied as section 2229, Penal Code, in *State v. Lucey*, 24 M 295, 305, 61 P 994; *State v. Mason*, 24 M 340, 61 P 861; *State v. Landry*, 29 M 218, 227, 74 P 418; *State v. Gordon*, 35 M 458, 468, 90 P 173; *State v. Paisley*, 36 M 237, 251, 92 P 566; *State v. Libby Yards*, 58 M 444, 193 P 394; *State v. Carmichael*, 62 M 159, 204 P 362; *State v. Sorenson*, 75 M 30, 35, 241 P 616; *State v. Atlas*, 75 M 547, 549, 244 P 477; *State v. Kepler et al.*, 77 M 307, 314, 250 P 603; *State v. Vallie*, 82 M 456, 460, 268 P 493; *State v. Daw*, 99 M 232, 43 P 2d 240.

Criminal Law §994 (1).

24 C.J.S. Criminal Law §§ 1595, 1596.

15 Am. Jur. 113, Criminal Law, § 454.

✓ **94-7821. (12078) Court may suspend sentence, when.** In all prosecutions for crimes or misdemeanors, except as hereinafter provided, where the defendant has pleaded or been found guilty, or where the court or magistrate has power to sentence such defendant to any penal or other institution in this state, and it appears that the defendant has never before been imprisoned for crime either in this state or elsewhere (but detention in an institution for juvenile delinquents shall not be considered imprisonment), and where it appears to the satisfaction of the court that the character of the defendant and circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and where it may appear that the public safety does not demand or require that the defendant shall suffer the penalty imposed by law, said court may suspend the execution of the sentence and place the defendant on probation in the manner hereinafter provided. Nothing in this act contained shall in any manner affect the laws providing the method of dealing with the juvenile delinquents. Any judge, who has suspended a sentence of imprisonment under this section, or his successor, is authorized thereafter, in his discretion, during the period of such suspended sentence to revoke such suspension and order such person

committed, or may, in his discretion, order the prisoner placed under the jurisdiction of the state board of prison commissioners as provided by law, or retain such jurisdiction with his court as is authorized by him or his successor. Prior to such revocation of the order of such suspension the person affected shall be given a hearing before said judge.

History: En. Sec. 1, Ch. 21, L. 1913; re-en. Sec. 12078, R. C. M. 1921; amd. Sec. 1, Ch. 184, L. 1937.

Floating—Sentence to Leave County—Void as Attempted Exercise of Pardoning Power

The provision of suspending sentence on condition that defendant leave and remain out of county has no force or effect other than to suspend sentence, and court has no power to pronounce a sentence in the absence of specific statutory authority. The prisoner is, by law, subject only to the rules and regulations of state board of pardons, and floating is void as an attempted exercise of pardoning power. Ex parte Sheehan, 100 M 244, 255, 49 P 2d 438.

Jury May Not Suspend Sentence

While the jury may, if they see fit, assess and declare the punishment in their verdict, it is the court which pronounces judgment and sentences the defendant, and the court only can suspend the execution of the sentence and place the defendant on probation. State v. Simanton, 100 M 292, 310, 49 P 2d 981.

Justice Courts

Provisions of this act clearly applicable to all persons prosecuted for public offenses in justice courts as well as district courts, irrespective of the fact that this section appears in portion of code dealing with district courts, and although a justice of the peace has no clerk as referred to in secs. 94-7825 and 94-7826, he may get blanks from the clerk of district court. Ex parte Sheehan, 100 M 244, 251, 255, 49 P 2d 438.

Operation and Effect

Under the terms of this section, in all prosecutions for crimes or misdemeanors, except as provided in the following section, the court may, under the conditions prescribed by the statute, suspend the execution of the sentence and place the defendant on probation. Assuming that the court had the power to suspend the execution of Held's sentence and to place

him upon probation, that power, too, must have been exercised at the time the sentence was pronounced. When an order suspending sentence under this section is made, it is, in effect, a part of the judgment itself. It is the court's direction as to how the judgment shall be carried into effect. State ex rel. Reid v. District Court, 68 M 309, 310, 311, 218 P 558.

Under this section, the district court has authority to suspend sentence and place the defendant on probation whether found guilty of a crime or a misdemeanor. State ex rel. Foot v. District Court et al., 72 M 374, 377, 233 P 957.

Under Chapter 21, Laws of 1913 (this section et seq.), providing for suspension of sentences in criminal cases, the order of suspension must be made before the defendant is committed to the institution wherein he is to serve his sentence. State ex rel. Bottomly v. District Court, 73 M 541, 543 et seq., 237 P 525.

Id. The statute providing for the suspension of sentences in criminal actions is designed to afford first offenders an opportunity for reformation and should be liberally construed.

Id. Defendant was convicted of a violation of the liquor law and sentenced to serve sixty days in jail and pay a fine. He at once perfected an appeal, secured a certificate of probable cause and was admitted to bail. Five months thereafter his appeal was dismissed and the trial court on the day the certificate of dismissal was received suspended his sentence. Held, on application for writ of supervisory control, that defendant never having been committed, the court could properly, after entry of judgment, suspend the sentence at the time it did.

Criminal Law 1001.

24 C.J.S. Criminal Law §§ 1615, 1618.

15 Am. Jur. 134, Criminal Law, §§ 479 et seq.

Constitutionality of statute conferring on court power to suspend sentence. 26 ALR 399.

Suspension of sentence on condition of leaving state or locality. 70 ALR 100.

94-7822. Suspension of sentence—copy of judgment to be mailed to board of prison commissioners and bureau of identification. When any judge has suspended a sentence of imprisonment as provided in section 94-7821, and has not ordered the prisoner placed under the jurisdiction of the state board of prison commissioners, but has retained jurisdiction with

the court, the clerk of said court shall nevertheless mail a full copy of the judgment of the court and the order suspending the sentence and certify the same to the state board of prison commissioners and bureau of identification at the state prison, or if the defendant would have been confined to an institution other than the state prison, then a copy shall be sent to the institution to which said court would have committed the defendant but for the suspending of the sentence.

History: En. Sec. 1, Ch. 40, L. 1939.

94-7823. (12079) Persons not entitled to probation. No person convicted of murder, arson, burglary of an inhabited dwelling house, incest, sodomy, rape without consent, assault with intent to rape or administering poison shall have the benefit of probation; provided, however, that in convictions of rape where the female is under the age of eighteen years, but over sixteen years of age, where previous unchaste conduct of the female is shown, the court may, in its discretion, suspend sentence as provided in section 94-7821.

History: En. Sec. 2, Ch. 21, L. 1913; re-en. Sec. 12079, R. C. M. 1921; amd. Sec. 1, Ch. 53, L. 1935.

References

State ex rel. Reid v. District Court, 68 M 309, 311, 218 F 558; State ex rel. Bottomly v. District Court, 73 M 541, 543 et seq., 237 P 525.

94-7824. (12080) Effect of suspended sentence. Whenever a sentence to any penal or other institution in this state has been imposed, but the execution thereof has been suspended and the defendant placed on probation, the effect of such order of probation shall be to place said defendant under the control and management of the state board of prison commissioners and he shall be subject to the same rules and regulations as applied to persons paroled from said institutions after a period of imprisonment therein.

History: En. Sec. 3, Ch. 21, L. 1913; re-en. Sec. 12080, R. C. M. 1921.

Operation and Effect

The effect of an order of the district court suspending the sentence of one convicted of a misdemeanor is to place him under the control and management of the state board of prison commissioners and subject to such rules and regulations as it may see fit to make. State ex rel. Foot v. District Court et al., 72 M 374, 377 et seq., 233 P 957.

References

State ex rel. Bottomly v. District Court, 73 M 541, 543 et seq., 237 P 525.

15 Am. Jur. 139, Criminal Law, §§ 486 et seq.

Pardon or parole, suspension of sentence or discharge, as affecting fine or penalty imposed in addition to imprisonment. 74 ALR 1118.

Convicted person's acceptance of provision, parole, or suspension of sentence as waiver of right to appeal. 117 ALR 929.

94-7825. (12081) Blank forms. It shall be the duty of the state board of prison commissioners to furnish the clerk of courts of each county with blank forms setting forth the requirements and conditions used by them in the parole of prisoners of the several institutions, but amended so as to be applicable to cases of probation.

History: En. Sec. 4, Ch. 21, L. 1913; re-en. Sec. 12081, R. C. M. 1921.

References

Ex parte Sheehan, 100 M 244, 252, 49 P 2d 438.

94-7826. (12082) Certificate of judgment and order for suspension. Whenever it is the judgment of the court that the defendant be placed upon

probation and under the supervision of the state board of prison commissioners, it shall be the immediate duty of the clerk of said court to make a full copy of the judgment of the court, with the order for the suspension of the execution of sentence thereunder and the reason therefor, and to certify the same to the state board of prison commissioners, and to the institution to which said court would have committed the defendant but for the suspension of sentence. Upon entry in the records of the court of the order for such probation, the defendant shall be released from custody of the court as soon as the requirements and conditions fixed by the state board of prison commissioners have been properly and fully met.

History: En. Sec. 5, Ch. 21, L. 1913; al., 72 M 374, 378, 233 P 957; State ex rel. re-en. Sec. 12082, R. C. M. 1921. Bottomly v. District Court, 73 M 541, 543 et seq., 237 P 525; Ex parte Sheehan, 100 M 244, 252, 49 P 2d 438.

References

State ex rel. Foot v. District Court et

94-7827. (12083) Rules and regulations. The state board of prison commissioners shall fix the rules and regulations governing all persons who may be released under the powers conferred by this act, and the said rules and regulations shall be administered and enforced by the traveling parole commissioner or his assistants, as directed by said state board of prison commissioners.

History: En. Sec. 6, Ch. 21, L. 1913; Bottomly v. District Court, 73 M 541, 543 et seq., 237 P 525. re-en. Sec. 12083, R. C. M. 1921.

References

State ex rel. Foot v. District Court et 15 Am. Jur. 148, Criminal Law, §§ 498, al., 72 M 374, 379, 233 P 957; State ex rel. 499.

94-7828. (12084) Termination of probation—arrest of prisoner. Whenever a person placed upon probation, as aforesaid, does not conduct himself in accordance with the rules and regulations, as fixed by the state board of prison commissioners, he shall be subject to arrest without warrant or other process, and shall be conveyed to and confined in the institution to which he would have been committed had he not been placed upon probation, and the said state board of prison commissioners may forthwith terminate the probation of said person and shall forthwith notify the proper officers of said institution. In all cases of such termination of probation, the original sentence shall be considered as beginning upon the first day of imprisonment in the institution.

History: En. Sec. 7, Ch. 21, L. 1913; Bottomly v. District Court, 73 M 541, 543 et seq., 237 P 525. re-en. Sec. 12084, R. C. M. 1921.

References

State ex rel. Foot v. District Court et See 15 Am. Jur. 151, Criminal Law, § 500. al., 72 M 374, 379, 233 P 957; State ex rel. Right to notice and hearing before revocation of suspension of sentence, parole or conditional pardon. 54 ALR 1471.

94-7829. (12085) Final discharge. Whenever it is the judgment of the state board of prison commissioners that a person on probation has satisfactorily met the conditions of his probation they shall cause to be issued to said person a final discharge from further supervision; provided, that the length of such period of probation shall not be less than the minimum or more than the maximum term for which he might have been imprisoned.

History: En. Sec. 8, Ch. 21, L. 1913;
re-en. Sec. 12085, R. C. M. 1921.

Operation and Effect

Under this section, the length of the period of probation of a convicted defendant cannot be more than the maximum term for which he might have been imprisoned. Defendant was convicted of a violation of the liquor laws and sentenced to the county jail for ninety days, the sentence being suspended. A year thereafter the court revoked the suspension and ordered him committed to jail. Held, on

application for writ of supervisory control, that by its order suspending the sentence, jurisdiction over the person of defendant became vested in the state board of prison commissioners, that the court, therefore, was without authority to order him committed, and, the term of his imprisonment having expired, that the board could not do so. *State ex rel. Foot v. District Court et al.*, 72 M 374, 379, 233 P 957.

References

State ex rel. Bottomly v. District Court, 73 M 541, 543 et seq., 237 P 525.

94-7830. (12086) Expenses. The expenses incident to the care and supervision of prisoners under the provisions of this act shall be paid out of the proper fund in the same manner as other expenses of the state penal institutions.

History: En. Sec. 9, Ch. 21, L. 1913;
re-en. Sec. 12086, R. C. M. 1921.

CHAPTER 79

UNIFORM ACT FOR OUT-OF-STATE PAROLEE SUPERVISION

Section 94-7901. Governor may make interstate compact for control of crime—conditions.
94-7902. Act, how cited.

94-7901. Governor may make interstate compact for control of crime—conditions. The governor of this state is hereby authorized and directed to enter into a compact on behalf of the state of Montana with any of the United States legally joining therein in the form substantially as follows:

A COMPACT. Entered into by and among the contracting states, signatories hereto, with the consent of the congress of the United States of America, granted by an act entitled "An act granting the consent of congress to any two or more states to enter into agreements or compacts for co-operative effort and mutual assistance in the prevention of crime and for other purposes".

The contracting states solemnly agree:

(1) That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact, (herein called "sending state") to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact, (herein called "receiving state") while on probation or parole, if

(a) Such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there,

(b) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving state will assume the duties of visitation and of supervision over the probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formality will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state: Provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference.

(5) That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its ratification by any state as between it and any other state or states so ratifying. When ratified it shall have the full force and effect of law within such state, the form of ratification to be in accordance with the laws of the ratifying state.

(7) That this compact shall continue in force and remain binding upon each ratifying state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which ratified it, by sending six months' notice in writing of its intention to withdraw from the compact to the other states party hereto.

History: En. Sec. 1, Ch. 189, L. 1937.

States 6.

59 C.J. States §§ 13, 14.

94-7902. Act, how cited. This act may be cited as the Uniform Act for Out-of-State Parolee Supervision.

History: En. Sec. 4, Ch. 189, L. 1937.

CHAPTER 80

THE EXECUTION

Section	94-8001.	Execution of a judgment other than of death.
	94-8002.	If for fine alone, execution to issue as in civil cases.
	94-8003.	Judgment of fine and imprisonment, how executed.
	94-8004.	Judgment of imprisonment—duty of sheriff.
	94-8005.	Power of officer.
	94-8006.	Sentence to hard labor.
	94-8007.	Execution upon judgment of death.
	94-8008.	Judgment of death, when suspended.
	94-8009.	Insanity of defendant, how determined.
	94-8010.	Duty of county attorney upon inquisition.
	94-8011.	Inquisition, how certified and filed.
	94-8012.	Proceedings upon finding of jury.
	94-8013.	Proceedings when female is supposed to be pregnant.
	94-8014.	Proceedings upon the finding of the jury.
	94-8015.	Judgment of death remaining in force, not executed.
	94-8016.	Punishment of death, how inflicted.
	94-8017.	Execution, where to take place and who to be present.
	94-8018.	Return upon death warrant.

94-8001. (12087) Execution of a judgment other than of death. When a judgment, other than of death, has been pronounced, a certified copy of the entry thereof upon the minutes must be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require its execution.

History: En. Sec. 2240, Pen. C. 1895; re-en. Sec. 9377, Rev. C. 1907; re-en. Sec. 12087, R. C. M. 1921. Cal. Pen. C. Sec. 1213.

Operation and Effect

Proceedings in contempt are in their nature criminal, and the order adjudging one in contempt is in its nature a final judgment, but the sheriff cannot execute a judgment in a criminal matter or proceeding "without competent authority," as provided in section 16-2818; hence, where one has been committed for contempt, and the sheriff does not hold a certified copy of the order of commitment, he is not authorized to detain the person so committed. In re Mettler, 50 M 299, 305, 146 P 747.

References

State v. Sorenson, 75 M 30, 36, 241 P 616.

Criminal Law 999 (1).

24 C.J.S. Criminal Law §§ 1608-1612.

15 Am. Jur. 182, Criminal Law, §§ 541 et seq.

Loss of jurisdiction by delay in imposing sentence. 3 ALR 1003.

Power to change time for commencement of sentence. 3 ALR 1572.

Power of court to set aside sentence after commitment. 44 ALR 1203.

Effect of delay in taking defendant into custody after conviction and sentence. 72 ALR 1271.

What constitutes commencement of service of sentence, depriving court of power to change sentence. 159 ALR 161.

94-8002. (12088) If for fine alone, execution to issue as in civil cases. If the judgment is for a fine alone, execution may be issued thereon as on a judgment in a civil action.

History: En. Sec. 2241, Pen. C. 1895; re-en. Sec. 9378, Rev. C. 1907; re-en. Sec. 12088, R. C. M. 1921. Cal. Pen. C. Sec. 1214.

Code, in State v. Towner, 26 M 339, 346, 67 P 1004; as section 9378, Revised Codes, in In re Londres, 54 M 418, 419, 170 P 1045.

References

Cited or applied as section 2241, Penal

Fines 6.

36 C.J.S. Fines § 9.

94-8003. (12089) Judgment of fine and imprisonment, how executed. If the judgment is for imprisonment, or a fine and imprisonment until it be paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with.

History: En. Sec. 2242, Pen. C. 1895; re-en. Sec. 9379, Rev. C. 1907; re-en. Sec. 12089, R. C. M. 1921. Cal. Pen. C. Sec. 1215.

Operation and Effect

An attorney found guilty of contempt was properly subject to punishment by fine and imprisonment until the fine was

paid. State ex rel. Coleman v. District Court, 51 M 195, 201, 149 P 973.

References

Cited or applied as section 2242, Penal Code, in State v. Towner, 26 M 339, 346, 67 P 1004; as section 9379, Revised Codes, in In re Londres, 54 M 418, 170 P 1045.

94-8004. (12090) Judgment of imprisonment—duty of sheriff. If the judgment is for imprisonment in the state prison, the sheriff of the county must, upon receipt of a certified copy thereof, take and deliver the defendant to the warden of the state prison. He must also deliver to the warden a certified copy of the judgment, a certified copy of the information or indictment, and take from the warden a receipt for the defendant.

History: En. Sec. 2243, Pen. C. 1895; re-en. Sec. 9380, Rev. C. 1907; re-en. Sec. 12090, R. C. M. 1921; amd. Sec. 1, Ch. 125, L. 1941. Cal. Pen. C. Sec. 1216.

Operation and Effect

The certified copy of the judgment is the evidence of the warden's authority for detaining the prisoner. Stephens v. Conley, 48 M 352, 367, 138 P 189.

94-8005. (12091) Power of officer. Such sheriff or deputy, while conveying the criminal to the place of punishment, has the same power and like authority to require the assistance of any citizen of the state in securing such criminal, and retaking him if he escapes, as such sheriff or deputy has in any other case; and all persons who neglect or refuse to assist such sheriff or deputy, when required, are liable to the same penalties as for similar refusals in other cases.

History: En. Sec. 218, p. 250, Bannack Stat.; re-en. Sec. 373, p. 245, Cod. Stat. 1871; re-en. Sec. 373, 3d Div. Rev. Stat. 1879; re-en. Sec. 374, 3d Div. Comp. Stat.

1887; re-en. Sec. 2244, Pen. C. 1895; re-en. Sec. 9381, Rev. C. 1907; re-en. Sec. 12091, R. C. M. 1921.

94-8006. (12092) Sentence to hard labor. In all cases of conviction for felony, the court sentencing any person convicted, must attach to the sentence of imprisonment the provision that such imprisonment be at hard labor, and whenever a jury designate in their verdict any term of imprisonment, the same means imprisonment at hard labor.

History: En. Sec. 1, p. 56, L. 1885; re-en. Sec. 472, 3d Div. Comp. Stat. 1887; re-en. Sec. 2245, Pen. C. 1895; re-en. Sec. 9382, Rev. C. 1907; re-en. Sec. 12092, R. C. M. 1921.

Criminal Law 995 (7).

24 C.J.S. Criminal Law § 1600.

94-8007. (12093) Execution upon judgment of death. When judgment of death is rendered, a warrant signed by the judge, and attested by the clerk under the seal of the court, must be drawn and delivered to the sheriff. It must state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must not be less than thirty nor more than sixty days from the time of the judgment.

History: En. Sec. 219, p. 250, Bannack Stat.; re-en. Sec. 374, p. 246, Cod. Stat. 1871; re-en. Sec. 374, 3d Div. Rev. Stat. 1879; re-en. Sec. 375, 3d Div. Comp. Stat. 1887; amd. Sec. 2246, Pen. C. 1895; re-en. Sec. 9383, Rev. C. 1907; re-en. Sec. 12093, R. C. M. 1921. Cal. Pen. C. Sec. 1217.

Criminal Law 1219.

24 C.J.S. Criminal Law §§ 2001-2003.

15 Am. Jur. 175, Criminal Law, § 527 et seq.

Manner of inflicting death sentence as cruel or unusual punishment. 30 ALR 1452.

94-8008. (12094) Judgment of death, when suspended. No judge, court, or officer, other than the governor, can suspend the execution of a judgment of death, except the sheriff, as provided in the six succeeding sections, unless an appeal is taken.

History: En. Sec. 2247, Pen. C. 1895; re-en. Sec. 9384, Rev. C. 1907; re-en. Sec. 12094, R. C. M. 1921. Cal. Pen. C. Sec. 1220.

References

State v. Vettere, 77 M 66, 71, 249 P 666.

Criminal Law—1001.

24 C.J.S. Criminal Law §§ 1615, 1618.

94-8009. (12095) Insanity of defendant, how determined. If, after judgment of death, there is good reason to suppose that the defendant has become insane, the sheriff of the county, with the concurrence of the judge of the court by which the judgment was rendered, may summon from the list of jurors selected for the year, a jury of twelve persons to inquire into the supposed insanity, and must give immediate notice thereof to the county attorney of the county.

History: En. Sec. 224, p. 251, Bannack Stat.; re-en. Sec. 379, p. 246, Cod. Stat. 1871; re-en. Sec. 379, 3d Div. Rev. Stat. 1879; re-en. Sec. 380, 3d Div. Comp. Stat. 1887; amd. Sec. 2248, Pen. C. 1895; re-en. Sec. 9385, Rev. C. 1907; re-en. Sec. 12095, R. C. M. 1921. Cal. Pen. C. Sec. 1221.

Operation and Effect

Where, after judgment of death has been pronounced upon a defendant, there is good reason to suppose that he has become insane, the sheriff, with the concurrence of the judge of the court by which the judgment was rendered, may summon a jury to inquire into the question of his sanity

in conformity with this section et seq.; but where during the course of the trial or before judgment of conviction is pronounced a doubt arises as to his mental condition, the procedure outlined by sections 94-9302 to 94-9307 is controlling. State v. Vettere, 77 M 66, 71, 249 P 666.

Criminal Law—981 (2).

24 C.J.S. Criminal Law §§ 1569, 1619.

Test of present insanity which will prevent trial for crime or punishment after conviction. 3 ALR 94.

Remedy of one convicted of crime while insane. 10 ALR 213.

94-8010. (12096) Duty of county attorney upon inquisition. The county attorney must attend the inquisition, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court.

History: En. Sec. 225, p. 251, Bannack Stat.; re-en. Sec. 380, p. 246, Cod. Stat. 1871; re-en. Sec. 380, 3d Div. Rev. Stat. 1879; re-en. Sec. 381, 3d Div. Comp. Stat.

1887; amd. Sec. 2249, Pen. C. 1895; re-en. Sec. 9386, Rev. C. 1907; re-en. Sec. 12096, R. C. M. 1921. Cal. Pen. C. Sec. 1222.

94-8011. (12097) Inquisition, how certified and filed. A certificate of the inquisition must be signed by the jurors and the sheriff, and filed with the clerk of the court in which the conviction was had.

History: En. Sec. 226, p. 251, Bannack Stat.; re-en. Sec. 381, p. 246, Cod. Stat. 1871; re-en. Sec. 381, 3d Div. Rev. Stat. 1879; re-en. Sec. 382, 3d Div. Comp. Stat.

1887; amd. Sec. 2250, Pen. C. 1895; re-en. Sec. 9387, Rev. C. 1907; re-en. Sec. 12097, R. C. M. 1921.

94-8012. (12098) Proceedings upon finding of jury. If it is found by the inquisition that the defendant is sane, the sheriff must execute the judgment; but if it is found that he is insane, the sheriff must suspend the execution of the judgment until he receives a warrant from the governor or from the judge of the court by which the judgment was rendered directing

the execution of the judgment. If the inquisition finds that the defendant is insane, the sheriff must immediately transmit it to the governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment.

History: Ap. p. Sec. 227, p. 251, Bannack Stat.; re-en. Sec. 382, p. 246, Cod. Stat. 1871; re-en. Sec. 382, 3d Div. Rev. Stat. 1879; re-en. Sec. 383, 3d Div. Comp. Stat. 1887; en. Sec. 2251, Pen. C. 1895; re-en. Sec. 9388, Rev. C. 1907; re-en. Sec.

12098, R. C. M. 1921. Cal. Pen. C. Sec. 1224.

References

State ex rel. Bottomly v. District Court, 73 M 541, 548, 237 P 525; State v. Vettere, 77 M 66, 71, 72, 249 P 666.

94-8013. (12099) Proceedings when female is supposed to be pregnant. If there is good reason to suppose that a woman against whom a judgment of death is rendered is pregnant, the sheriff of the county, with the concurrence of the judge of the court by which the judgment was rendered, may summon a jury of three physicians to inquire into the supposed pregnancy. Immediate notice thereof must be given to the county attorney of the county, and the provisions of sections 94-8010 and 94-8011 apply to the proceedings upon the inquisition.

History: En. Sec. 228, p. 251, Bannack Stat.; re-en. Sec. 383, p. 247, Cod. Stat. 1871; re-en. Sec. 383, 3d Div. Rev. Stat. 1879; re-en. Sec. 384, 3d Div. Comp. Stat. 1887; amd. Sec. 2252, Pen. C. 1895; re-en. Sec. 9389, Rev. C. 1907; re-en. Sec. 12099, R. C. M. 1921. Cal. Pen. C. Sec. 1225.

References

State ex rel. Bottomly v. District Court, 73 M 541, 548, 237 P 525; State v. Vettere, 77 M 66, 71, 249 P 666.

94-8014. (12100) Proceedings upon the finding of the jury. If it is found by the inquisition that the woman is not pregnant, the sheriff must execute the judgment; if it is found that the woman is pregnant, the sheriff must suspend the execution of the judgment, and transmit the inquisition to the governor. When the governor is satisfied that the woman is no longer pregnant, he may issue his warrant appointing a day for the execution of the judgment.

History: En. Secs. 229, 230, p. 251, Bannack Stat.; re-en. Secs. 384, 385, p. 247, Cod. Stat. 1871; re-en. Secs. 384, 385, 3d Div. Rev. Stat. 1879; re-en. Secs. 385, 386,

3d Div. Comp. Stat. 1887; amd. Sec. 2253, Pen. C. 1895; re-en. Sec. 9390, Rev. C. 1907; re-en. Sec. 12100, R. C. M. 1921. Cal. Pen. C. Sec. 1226.

94-8015. (12101) Judgment of death remaining in force, not executed. If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction was had, on the application of the county attorney, must order the defendant to be brought before it, or, if he is at large, a warrant for his apprehension may be issued. Upon the defendant being brought before the court, it must inquire into the facts, and if no legal reasons exist against the execution of the judgment, must make an order that the sheriff execute the judgment at a specified time. The sheriff must execute the judgment accordingly.

History: En. Secs. 231, 232, p. 252, Bannack Stat.; re-en. Secs. 386, 387, p. 247, Cod. Stat. 1871; re-en. Secs. 386, 387, 3d Div. Rev. Stat. 1879; re-en. Secs. 387, 388, 3d Div. Comp. Stat. 1887; amd. Sec. 2254, Pen. C. 1895; re-en. Sec. 9391, Rev. C. 1907; re-en. Sec. 12101, R. C. M. 1921. Cal. Pen. C. Sec. 1227.

References

Cited or applied as section 2254, Penal Code, in State v. Cadotte, 17 M 315, 321, 42 P 857; State v. Vettere, 77 M 66, 69, 249 P 666.

Criminal Law—1219.

23 C.J.S. Criminal Law §§ 1201-1203.
15 Am. Jur. 162, Criminal Law, § 513.

Effect of permitting day fixed for execution to pass without carrying out sentence. 34 ALR 314.

94-8016. (12102) Punishment of death, how inflicted. The punishment of death must be inflicted by hanging the defendant by the neck until he is dead.

History: En. Sec. 220, p. 250, Bannack Stat.; re-en. Sec. 375, p. 246, Cod. Stat. 1871; re-en. Sec. 375, 3d Div. Rev. Stat. 1879; re-en. Sec. 376, 3d Div. Comp. Stat. 1887; amd. Sec. 2255, Pen. C. 1895; re-en.

Sec. 9392, Rev. C. 1907; re-en. Sec. 12102, R. C. M. 1921. Cal. Pen. C. Sec. 1228.

See 15 Am. Jur. 175, Criminal Law, § 528.
Manner of inflicting death sentence as cruel or unusual punishment. 30 ALR 1452.

94-8017. (12103) Execution, where to take place and who to be present. A judgment of death must be executed within the walls or yard of a jail, or some convenient private place in the county. The sheriff of the county must be present at the execution, and must invite the presence of a physician, the county attorney of the county, and at least twelve reputable citizens, to be selected by him; and he shall, at the request of the defendant, permit such priests or ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

History: En. Sec. 222, p. 250, Bannack Stat.; re-en. Sec. 377, p. 246, Cod. Stat. 1871; re-en. Sec. 377, 3d Div. Rev. Stat. 1879; re-en. Sec. 378, 3d Div. Comp. Stat.

1887; amd. Sec. 2256, Pen. C. 1895; re-en. Sec. 9393, Rev. C. 1907; re-en. Sec. 12103, R. C. M. 1921. Cal. Pen. C. Sec. 1229.

94-8018. (12104) Return upon death warrant. After the execution, the sheriff must make a return upon the death warrant, showing the time, mode, and manner in which it was executed.

History: En. Sec. 2257, Pen. C. 1895; re-en. Sec. 9394, Rev. C. 1907; re-en. Sec. 12104, R. C. M. 1921. Cal. Pen. C. Sec. 1230.

CHAPTER 81

APPEALS TO SUPREME COURT—WHEN ALLOWED—HOW TAKEN—EFFECT THEREOF

- Section 94-8101. Defendant may appeal from any judgment.
94-8102. Parties, how designated on appeal.
94-8103. Appeal, when may be taken by the defendant.
94-8104. In what cases by the state.
94-8105. Appeals, time limitation.
94-8106. Appeal, how taken.
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94-8112. Duty of clerks upon appeal.
94-8113. Appeal, when tried.
94-8114. Appeal by one defendant.

94-8101. (12105) Defendant may appeal from any judgment. An appeal to the supreme court may be taken by the defendant, as a matter of right, from any judgment against him.

History: En. Sec. 242, p. 253, Bannack Stat.; re-en. Sec. 393, p. 249, Cod. Stat. 1871; re-en. Sec. 393, 3d Div. Rev. Stat. 1879; re-en. Sec. 394, 3d Div. Comp. Stat. 1887; re-en. Sec. 2270, Pen. C. 1895; re-en. Sec. 9395, Rev. C. 1907; re-en. Sec. 12105, R. C. M. 1921. Cal. Pen. C. Sec. 1235.

Operation and Effect

This section and section 94-8103 do not give the right of appeal from an order denying a writ of habeas corpus, since the complainant in such a proceeding is not a defendant, and the determination of the court is not a "judgment," within the meaning of those sections. State ex rel. Jackson v. Kennie, 24 M 45, 50, 60 P 589.

Id. The judgment mentioned in this section is the final judgment or other order referred to in section 94-8103, and embraces only those judgments and orders which become res adjudicata and final as to all matters involved in the controversy.

Id. An order denying a writ of habeas corpus is not such a judgment as to render the rights of the petitioner res adjudicata, and finally to conclude him.

References

Cited or applied as section 393, p. 249, Codified Statutes 1871, in United States v. Smith, 2 M 487; as section 2270, Penal Code, in State v. O'Brien, 18 M 1, 5, 43 P 1091, 44 P 399.

Criminal Law—1004.

24 C.J.S. Criminal Law § 1623.

2 Am. Jur., Appeal and Error, p. 857, § 17; pp. 934-936, §§ 140-143; pp. 984-989, §§ 226-235; 3 Am. Jur., Appeal and Error, p. 82, §§ 328 et seq.; p. 307, § 729; p. 397, § 857; p. 405, § 866; p. 414, § 870; p. 538, § 979; p. 560, § 1005; p. 595, § 1040; p. 599, § 1046; p. 643, § 1123; p. 658, § 1144; p. 662, § 1149; p. 681, §§ 1171, 1172; p. 717, § 1216.

Remedy of one convicted of crime while insane. 10 ALR 213.

Payment of fine or serving sentence, as waiver of right to review conviction. 18 ALR 867.

Prejudicial error in instructing as to lesser degree of homicide, in absence of evidence to support charge of lesser degree. 21 ALR 603.

Incompetency or mismanagement of attorney as grounds for new trial or reversal in criminal case. 24 ALR 1025.

New trial on ground of newly discovered evidence which court has jurisdiction to determine motion for, pending appeal or after affirmance of conviction. 27 ALR 1091.

Appeal as remedy for delay in bringing accused to trial or to retrial after reversal. 58 ALR 1515.

Communications between jurors and others as grounds for reversal in criminal case. 62 ALR 1466.

Instruction disparaging defense of alibi as prejudicial error. 67 ALR 126.

Reversal as to one party to conspiracy as requiring reversal as to others. 72 ALR 1188.

Criticism of argument of defendant's counsel in criminal case in judge's charge to jury. 86 ALR 899.

Reduction by appellate court of punishment imposed by trial court. 89 ALR 295.

Jurisdiction to proceed with trial of criminal case pending appeal from order overruling demurrer or motion for dismissal. 90 ALR 241.

Irregularity in drawing names for jury panel as ground of complaint by defendant in criminal prosecution. 92 ALR 1109.

Abuse of discretion by judge in criminal case under rule permitting him to express comment or opinion on weight or significance of evidence. 95 ALR 785.

Excusing qualified juror drawn in criminal case as ground of complaint by defendant. 96 ALR 508.

Knowledge by defendant or his attorney, before return of verdict in criminal case, of misconduct in connection with jury after their retirement as affecting right to reversal. 96 ALR 530.

Loss of jurisdiction by delay in imposing sentence in criminal case pending proceedings to review. 97 ALR 811.

Raising for first time on appeal question of right to preliminary investigation as to voluntary character of confession. 102 ALR 625.

Errors in calling upon accused in presence of jury to produce document in his possession, as cured by cautionary instruction. 110 ALR 114.

Permitting taking of dying declarations to jury room. 114 ALR 1519.

Presumption that court sitting without jury in criminal prosecution acted only on basis of proper evidence. 116 ALR 558.

Convicted person's acceptance of probation, parole, or suspension of sentence as waiver of right to appeal. 117 ALR 929.

Comment by prosecuting attorney on accused's failure to offer, or refusal to permit introduction of, privileged testimony, or to permit privileged witness to testify, as grounds for reversal. 116 ALR 1175.

Error in excluding exculpatory statements where state has introduced incriminating portion of conversation or

statements by accused, as cured by permitting defendant to testify as to such statements. 118 ALR 146.

Reversible error in failing to instruct on subject of alibi. 118 ALR 1303.

Comment by prosecuting attorney regarding jury's right or privilege to recommend or fix punishment. 120 ALR 502.

Discretion of trial court in criminal case as to permitting or denying view of premises where crime was committed. 124 ALR 841.

Judgment or order suspending imposition or execution of sentence, or judgment in quasi-criminal case, execution of which is suspended, as a final judgment or decision from which an appeal will lie. 126 ALR 1210.

Statements or arguments by prosecuting attorney to give jury impression that court believed defendant guilty as grounds for reversal. 127 ALR 357.

Reference by court or prosecuting attorney to right of defendant in criminal case to appeal to higher court or to apply for executive clemency or parole. 132 ALR 679.

Ruling against defendant's attack upon indictment or information as subject to review by higher court, before trial. 133 ALR 935.

Alien enemy's right to appeal. 137 ALR 1345, 1365.

Suspension of appeal during war where party is alien enemy. 137 ALR 1346.

Application for or acceptance of executive clemency as affecting appellate proceedings. 138 ALR 1162.

Time for and manner of raising question of present sanity of accused. 142 ALR 973.

Exclusion or absence of defendant, pending trial of criminal case, from courtroom or from conference between court and attorneys, during argument on the question of law. 144 ALR 199.

Overemphasis in proof of former conviction in connection with habitual criminal law, or unnecessary introduction of evidence in that regard, as prejudicial to accused. 144 ALR 240.

Right of accused to attack indictment or information after reversal or setting aside of conviction. 145 ALR 493.

Lower court's consideration, on the merits of unreasonable application for new trial, rehearing, or other re-examination, as affecting time in which to apply for appellate review. 148 ALR 795.

Plea of guilty without advice of counsel. 149 ALR 1403.

94-8102. (12106) Parties, how designated on appeal. The party appealing is known as the appellant, and the adverse party as the respondent, but the title of the action is not changed in consequence of the appeal.

History: En. Sec. 2271, Pen. C. 1895; re-en. Sec. 9396, Rev. C. 1907; re-en. Sec. 12106, R. C. M. 1921. Cal. Pen. C. Sec. 1236.

Criminal Law § 1070.

24 C.J.S. Criminal Law § 1702.

94-8103. (12107) Appeal, when may be taken by the defendant. An appeal may be taken by the defendant—

1. From a final judgment of conviction;
2. From an order denying a motion for a new trial;
3. From an order made after judgment, affecting the substantial rights of the party.

History: En. Sec. 2272, Pen. C. 1895; re-en. Sec. 9397, Rev. C. 1907; re-en. Sec. 12107, R. C. M. 1921. Cal. Pen. C. Sec. 1237.

Operation and Effect

An appeal from an order overruling a motion in arrest of judgment does not lie on behalf of defendant. *State v. Beeskove*, 34 M 41, 48, 85 P 376; *State v. Brown*, 38 M 309, 311, 99 P 954.

From an order made after final judgment in a criminal case, defendant may appeal, under this section. *State v. Fowler*, 59 M 346, 358, 196 P 992.

On appeal from the judgment of conviction only, an assignment of error for denial of defendant's motion for a new trial cannot be considered. *State v. Ritz*,

65 M 180, 189, 211 P 298; *State v. English*, 71 M 343, 350, 229 P 727.

The act of defendant in a criminal prosecution in perfecting an appeal from the judgment of conviction while his motion for a new trial was pending, did not deprive the trial court of jurisdiction thereafter to pass upon the motion, nor the supreme court of jurisdiction to consider the subsequent appeal from the order denying the new trial. *State v. Harkins*, 85 M 585, 590, 281 P 551.

References

Cited or applied as section 2272, Penal Code, in *State v. Cadotte*, 17 M 315, 316, 42 P 857; *State ex rel. Jackson v. Kennie*, 24 M 45, 50, 60 P 589; *State v. Beeskove*,

34 M 41, 48, 85 P 376; *State v. Brantingham*, 66 M 1, 7, 212 P 499; *State v. Gangner*, 73 M 187, 190, 235 P 703.

Criminal Law §1023 (2, 12, 13).
24 C.J.S. Criminal Law §§ 1651, 1654, 1655, 1656.

94-8104. (12108) In what cases by the state. An appeal may be taken by the state—

1. From a judgment for the defendant on a demurrer to the indictment or information;
2. From an order granting a new trial;
3. From an order arresting judgment;
4. From an order made after judgment, affecting the substantial rights of the state;
5. From an order of the court directing the jury to find for the defendant.

History: En. Sec. 2273, Pen. C. 1895; re-en. Sec. 9398, Rev. C. 1907; re-en. Sec. 12108, R. C. M. 1921. Cal. Pen. C. Sec. 1238.

Subd. 5

Constitutionality

Held, that this subdivision is the only mode provided to correct such errors as directing, instead of advising, a verdict in compliance with the provisions of sec. 94-7227, and disregarding uncontradicted testimony amply sufficient to carry the question to the jury under proper instructions, and the section is not unconstitutional. *State v. Thierfelder*, 114 M 104, 116, 132 P 2d 1035.

Court May Advise Acquittal, But Is Prohibited from Directing a Verdict in Criminal Case

The trial court is prohibited from directing a verdict in any criminal case; if the advice for acquittal be disregarded by the jury, the remedy is by granting a new trial; held further, that the state's appeal from an order made at the close of its case in chief directing return of a verdict in favor of defendant, is not subject to dismissal on the ground that the record on appeal did not contain a copy of the judgment (sec. 94-7820) since it did contain a copy of the order with the attributes constituting the judgment. *State v. Thierfelder*, 114 M 104, 108, 111, 132 P 2d 1035.

Judgment for Defendant on a Demurrer to the Information

The record on appeal in a criminal case must, among other things, contain the judgment roll in which must be included a copy of the judgment. The state, on the theory that an objection of defendant to the introduction of evidence on the ground of the insufficiency of the information is in effect a demurrer to the information and an order sustaining a demurrer con-

stitutes the judgment, attempted to appeal from such an order as from the judgment, but the record did not contain a copy of the order in the form of a minute entry, which in such a case constitutes the judgment. Held, that the supreme court was without jurisdiction to entertain the appeal. *State v. Nilan et al.*, 75 M 397, 399, 243 P 1081.

Order Arresting Judgment

Regarding the substance of things, an order arresting judgment is, in its nature and results, a judgment for defendant. It is a denying of a judgment to the state, and a discharge and acquittal of defendant from any possible consequences that threatened to flow from the information. *State v. Northrup*, 13 M 522, 537, 35 P 228.

Order Made After Judgment

An order of the district court sustaining a defendant's plea of former acquittal and jeopardy, after the reversal of a conviction for manslaughter under an indictment charging murder in the first degree, is not an appealable order under subdivision 4. *State v. O'Brien*, 19 M 6, 47 P 103.

Order Sustaining Demurrer to Information Constitutes Judgment

Under sec. 94-6706, an order sustaining a demurrer to an information constitutes a judgment. *State v. Safeway Stores, Inc.*, 106 M 182, 197, 76 P 2d 81.

Right to Appeal Limited by This Section

The right of appeal by the state should be strictly construed and limited to those instances mentioned in the statute. *Territory v. Laun*, 8 M 322, 325, 20 M 652; *State v. Northrup*, 13 M 522, 530, 35 P 228.

Id. The state has no appeal in criminal cases, unless the same is expressly granted by law.

An appeal cannot be taken by the state from an order setting aside an information. *State v. O'Brien*, 20 M 191, 50 P 412.

The state is not authorized by this section to appeal from a judgment for de-

defendant on demurrer to a complaint charging defendant with the commission of a misdemeanor. *State v. Morris*, 22 M 1, 3, 55 P 360.

The right of appeal in a criminal case, unknown to the common law, exists only by virtue of constitutional or statutory enactment. *State v. Peck*, 83 M 327, 329, 271 P 707.

Id. Statutes granting the right of appeal to the state in criminal actions must be strictly construed and the right limited to the instances mentioned; if the right is not clearly and unequivocally conferred, an appeal does not lie, nor can the right, if conferred, be enlarged by construction of the statute.

Id. Subdivision 5 of this section, provides that the state may appeal in a criminal case *inter alia*, from an order directing the jury to find for the defendant. At the close of the testimony in such a case the court ordered defendant discharged on the ground of failure of proof, the state appealing from the order. Held, under the rule of strict construction, that the order may not be held appealable as one "in effect" directing the jury to find for defendant and, such an order not being enumerated in this section as one from which the state may appeal, the appeal will on defendant's motion be dismissed.

Defendant was convicted in a justice court of engaging in the business of plumbing without obtaining a license (secs. 11-2101 et seq.); he appealed to the district court where, after trial, the court entered judgment that the statute in question was unconstitutional and dis-

charged defendant. The state appealed. Held, that the judgment does not fall within any one of the provisions of this section, granting the state the right of appeal in a criminal case, and appeal dismissed. *State v. Wright*, 91 M 427, 429, 8 P 2d 646.

References

Cited or applied as section 2273, Penal Code, in *State ex rel. Jackson v. Kennie*, 24 M 45, 50, 60 P 589; as section 9398, Revised Codes, in *State v. Libby Yards*, 58 M 444, 193 P 394; *State v. Labbitt*, 117 M 26, 34, 156 P 2d 163.

Criminal Law 1024 (1, 2, 3, 4, 7).

24 C.J.S. Criminal Law §§ 1659-1662.

2 Am. Jur. 984-986, Appeal and Error, §§ 226-228.

Right of prosecution to review of decision quashing or dismissing indictment or information, or sustaining demurrer thereto. 92 ALR 1137.

Constitutionality of statute permitting appeal by state in criminal case. 113 ALR 636.

Right of municipality to review of unfavorable decision in action for violation of municipal ordinance. 116 ALR 120.

Right of public officer or board to appeal from a judicial decision affecting his or its order or decision. 117 ALR 216.

Judgment or order suspending imposition or execution of sentence, or judgment in quasi-criminal case, execution of which is suspended, as a final judgment or decision from which an appeal will lie. 126 ALR 1210.

94-8105. (12109) Appeals, time limitation. An appeal from a judgment may be taken within six months after its rendition, and from an order within sixty days after it is made.

History: En. Sec. 2274, Pen. C. 1895; re-en. Sec. 9399, Rev. C. 1907; re-en. Sec. 12109, R. C. M. 1921; amd. Sec. 1, Ch. 42, L. 1935. Cal. Pen. C. Sec. 1239.

Criminal Law 1069 (1).

24 C.J.S. Criminal Law § 1703.

94-8106. (12110) Appeal, how taken. An appeal may be taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party.

History: En. Sec. 246, p. 254, Bannack Stat.; re-en. Sec. 397, p. 249, Cod. Stat. 1871; re-en. Sec. 397, 3d Div. Rev. Stat. 1879; re-en. Sec. 398, 3d Div. Comp. Stat. 1887; amd. Sec. 2275, Pen. C. 1895; re-en. Sec. 9400, Rev. C. 1907; re-en. Sec. 12110, R. C. M. 1921. Cal. Pen. C. Sec. 1240.

References

Cited or applied as section 2275, Penal Code, in *State ex rel. Connors v. Foster*, 36 M 278, 280, 92 P 761; as section 9400, Revised Codes, in *State v. Libby Yards*, 58 M 444, 193 P 394; *State v. Nilan et al.*, 75 M 397, 400, 243 P 1081; *State v.*

Atlas, 75 M 547, 549, 244 P 477; State v. Thierfelder, 114 M 104, 109, 132 P 2d 1035.

Criminal Law—1081.
24 C.J.S. Criminal Law § 1711.
3 Am. Jur. 153, Appeal and Error, §§ 442 et seq.

94-8107. (12111) When notice may be served by publication. If personal service cannot be made, the judge of the court in which the action is tried, upon proof thereof, may make an order for the publication of the notice in some newspaper, for a period of not exceeding thirty days. Such publication is equivalent to personal service.

History: En. Sec. 2276, Pen. C. 1895; 12111, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9401, Rev. C. 1907; re-en. Sec. 1241.

94-8108. (12112) Effect of an appeal by the state. An appeal taken by the state in no case stays or affects the operation of the judgment in favor of the defendant until judgment is reversed.

History: En. Sec. 247, p. 254, Bannack Stat.; re-en. Sec. 398, p. 250, Cod. Stat. 1871; re-en. Sec. 398, 3d Div. Rev. Stat. 1879; re-en. Sec. 399, 3d Div. Comp. Stat. 1887; re-en. Sec. 2277, Pen. C. 1895; re-en. Sec. 9402, Rev. C. 1907; re-en. Sec. 12112, R. C. M. 1921. Cal. Pen. C. Sec. 1242.
Criminal Law—1084.
24 C.J.S. Criminal Law § 1715.

94-8109. (12113) Effect of an appeal by the defendant. An appeal to the supreme court from a judgment of conviction, stays the execution of the judgment in all capital cases, and in all other cases upon filing with the clerk of the court in which the conviction was had, a certificate of the judge of such court, or of a justice of the supreme court, that in his opinion, there is probable cause for the appeal, but not otherwise.

History: En. Sec. 2278, Pen. C. 1895; re-en. Sec. 9403, Rev. C. 1907; re-en. Sec. 12113, R. C. M. 1921. Cal. Pen. C. Sec. 1243.

ing the necessity of defendant applying to the supreme court for relief in that behalf. State v. Dahlgren, 74 M 217, 235, 239 P 775.

Operation and Effect

Petitions to a justice of the supreme court for certificates of probable cause must be verified by the oath of the petitioner, or of some person in his behalf. State v. Broadbent, 27 M 63, 65, 69 P 323.

Id. No appeal lies from a refusal of a district judge to grant a certificate of probable cause.

Id. Where the transcript discloses a fairly debatable question, the solution of which in defendant's favor by the supreme court would necessitate a reversal, a certificate of probable cause will be granted.

Execution of a judgment in a criminal case is not stayed by appeal, but may be stayed by filing with the clerk a certificate of probable cause issued by the judge or a justice of the supreme court. State v. Fowler, 59 M 346, 358, 196 P 992.

The effect of a certificate of probable cause granted to one convicted of crime pending appeal, is to suspend execution of the judgment and entitles defendant to his liberty upon furnishing bond, and the certificate should be granted by the district court whenever the question whether or not the conviction will be sustained on appeal is fairly debatable, thus avoid-

Stay of Proceedings Granted to Present Bill of Exceptions to Determine Question of Probable Cause

On appeal from conviction for embezzlement, presenting the question of former jeopardy, the trial court denied defendant a certificate of probable cause. Whereupon he applied to the supreme court for such certificate and for a stay of proceedings until a bill of exceptions could be prepared, settled and allowed (the supreme court needing the same to determine the question of probable cause). The stay was granted to present the bill of exceptions and transcript in aid of the application for the certificate of probable cause. State v. Parmenter, 111 M 290, 291, 108 P 2d 600.

References

Cited or applied as section 2278, Penal Code, in State v. Cadotte, 17 M 315, 321, 42 P 857; State v. McDonald, 27 M 66, 67, 69 P 323; State ex rel. Bottomly v. District Court, 73 M 541, 544, 237 P 525; State v. Harkins, 85 M 585, 591, 281 P 551.

3 Am. Jur. 195, Appeal and Error, §§ 535 et seq.

94-8110. (12114) **Same.** If the certificate provided for in the preceding section is filed, the sheriff must, if the defendant be in his custody, upon being served with a copy thereof, keep the defendant in his custody without executing the judgment, and detain him to abide the judgment on appeal.

History: En. Sec. 2279, Pen. C. 1895; 12114, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9404, Rev. C. 1907; re-en. Sec. 1244.

94-8111. (12115) **Same.** If before the granting of the certificate, the judgment has commenced, the further execution thereof is suspended, and upon service of a copy of such certificate the defendant must be restored, by the officer in whose custody he is, to his original custody.

History: En. Sec. 2280, Pen. C. 1895; re-en. Sec. 9405, Rev. C. 1907; re-en. Sec. 12115, R. C. M. 1921. Cal. Pen. C. Sec. 1245.

94-8112. (12116) **Duty of clerks upon appeal.** Upon the appeal being taken, the clerk with whom the notice of appeal is filed must, within ten days thereafter, in case the bill of exceptions has been settled by the judge before the giving of said notice, but if not, then within ten days from the settlement of the bill of exceptions, without charge transmit to the clerk of the appellate court a copy of the notice of appeal, and of the record and of all bills of exceptions, instructions, and indorsements thereon; and, upon the receipt thereof, the clerk of the appellate court must file the same, and perform the same services, as in civil cases, without charge.

History: En. Sec. 2281, Pen. C. 1895; re-en. Sec. 9406, Rev. C. 1907; re-en. Sec. 12116, R. C. M. 1921. Cal. Pen. C. Sec. 1246.

Operation and Effect

The supreme court is without jurisdiction to consider an appeal where the record does not contain a copy of the notice of appeal. *City of Butte v. Call*, 23 M 94, 95, 57 P 726.

Where the record on appeal does not contain the judgment, the appeal is subject to dismissal on motion. *State v. Mott*, 29 M 292, 308, 74 P 728.

The merits of an appeal in a criminal case will not be considered where the papers constituting the record are included in a bill of exceptions and not certified as the record, nor identified in any way by the certificate of the clerk of the district court or the trial judge. *State v. Farris*, 34 M 424, 425, 87 P 177.

The clerk of the district court must, as soon as notice of appeal is filed, prepare a copy of the record and other papers and transmit the same within ten days from the date of the notice, or, in case there is a bill of exceptions to be settled, then within ten days of the date of settlement, to the clerk of the supreme court, without charge to the appellant. A praecipe enumerating the papers constituting such technical record need not be lodged

with the clerk. *State ex rel. Connors v. Foster*, 36 M 278, 280, 92 P 761.

Requirements on Appeal from Order Sustaining Demurrer

Record on appeal from an order sustaining a demurrer to the information, consisting of the information, demurrer and ruling thereon, notice of appeal, copy of minute entries and certificate of the clerk of court, held, sufficient as against contention that it should consist of a bill of exceptions duly settled; the record containing all that is required by this section, except instructions, none having been given; no exception being required to court's ruling on demurrer, bill of exceptions therefore idle act. *State v. Safeway Stores, Inc.*, 106 M 182, 197, 76 P 2d 81.

References

Cited or applied as section 9406, Revised Codes, in *State v. Libby Yards*, 58 M 444, 193 P 394; *State v. Elmer Lundmark*, 84 M 616, 282 P 1115; *State v. Harkins*, 85 M 585, 590, 281 P 551.

Criminal Law § 1106 (2).

24 C.J.S. Criminal Law § 1772.

3 Am. Jur. 153, Appeal and Error, §§ 442 et seq.

Seal as necessary to validity of transcript of records. 30 ALR 739.

94-8113. (12117) **Appeal, when tried.** An appeal shall stand for trial immediately after filing the transcript on appeal, if the supreme court is in

session; if not in session, at the next term thereafter, on proof of notice of appeal to the respondent.

History: En. Sec. 250, p. 254, Bannack Stat.; re-en. Sec. 401, p. 250, Cod. Stat. 1871; re-en. Sec. 401, 3d Div. Rev. Stat. 1879; re-en. Sec. 402, 3d Div. Comp. Stat. 1887; re-en. Sec. 2282, Pen. C. 1895; re-en. Sec. 9407, Rev. C. 1907; re-en. Sec. 12117, R. C. M. 1921. Criminal Law \S 1132. 24 C.J.S. Criminal Law \S 1829.

94-8114. (12118) Appeal by one defendant. When several defendants are tried jointly, any one or more of them may take an appeal; but those who do not join in the appeal shall not be affected thereby.

History: En. Sec. 251, p. 254, Bannack Stat.; re-en. Sec. 402, p. 250, Cod. Stat. 1871; re-en. Sec. 402, 3d Div. Rev. Stat. 1879; re-en. Sec. 403, 3d Div. Comp. Stat. 1887; re-en. Sec. 2283, Pen. C. 1895; re-en. Sec. 9408, Rev. C. 1907; re-en. Sec. 12118, R. C. M. 1921. Criminal Law \S 1023½. 24 C.J.S. Criminal Law \S 1658.

CHAPTER 82

DISMISSING APPEALS FOR IRREGULARITY—ARGUMENT ON APPEAL —JUDGMENT ON APPEAL

- Section 94-8201. For what irregularity and how dismissed.
 94-8202. Dismissed for want of a return.
 94-8203. Informality in appeal disregarded.
 94-8204. Judgment cannot be reversed without argument.
 94-8205. Number of counsel to be heard.
 94-8206. Defendant need not be present.
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 94-8210. May reverse, affirm or modify the judgment and order a new trial.
 94-8211. New trial, where to be had.
 94-8212. Defendant discharged on reversal of judgment.
 94-8213. Judgment to be executed on affirmance.
 94-8214. Judgment of appellate court, how entered and remitted.
 94-8215. Jurisdiction ceases after judgment remitted.

94-8201. (12119) For what irregularity and how dismissed. If the appeal is irregular in any substantial particular, but not otherwise, the appellate court may, on any day, on motion of the respondent, upon five days' notice, accompanied with copies of the papers upon which the motion is founded, order it to be dismissed. The dismissal of an appeal affirms the judgment.

History: En. Sec. 2300, Pen. C. 1895; re-en. Sec. 9409, Rev. C. 1907; re-en. Sec. 12119, R. C. M. 1921. Cal. Pen. C. Sec. 1248. Criminal Law \S 1131 (4). 24 C.J.S. Criminal Law \S 1825. 3 Am. Jur. 304, Appeal and Error, $\S\S$ 724 et seq.

References

State ex rel. Bottomly v. District Court, 73 M 541, 544, 237 P 525.

94-8202. (12120) Dismissed for want of a return. The court may also, upon like motion, dismiss the appeal, if the transcript is not made as provided in section 94-8112, unless for good cause they enlarge the time for the purpose.

History: En. Sec. 2301, Pen. C. 1895; re-en. Sec. 9410, Rev. C. 1907; re-en. Sec. 12120, R. C. M. 1921. Cal. Pen. C. Sec. 1249.

Criminal Law 1106 (3).

24 C.J.S. Criminal Law § 1772.

94-8203. (12121) Informality in appeal disregarded. An appeal must not be dismissed for any informality or defect in the taking thereof. If the same be corrected within a reasonable time after an appeal has been dismissed, another appeal may be taken. If an undertaking has been given which is defective in any respect a new one may be filed on appeal, in the supreme court.

History: En. Sec. 255, p. 255, Bannack Stat.; re-en. Sec. 406, p. 250, Cod. Stat. 1871; re-en. Sec. 406, 3d Div. Rev. Stat. 1879; re-en. Sec. 407, 3d Div. Comp. Stat. 1887; amd. Sec. 2302, Pen. C. 1895; re-en. Sec. 9411, Rev. C. 1907; re-en. Sec. 12121, R. C. M. 1921.

References

Cited or applied as section 407, Third

Division Compiled Statutes 1887, in Territory v. Harris, 7 M 429, 17 P 557; Territory v. Milroy, 7 M 559, 19 P 209.

Criminal Law 1014.

24 C.J.S. Criminal Law § 1633.

3 Am. Jur. 314, Appeal and Error, §§ 738 et seq.

94-8204. (12122) Judgment cannot be reversed without argument. The judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, though the respondent fail to appear.

History: En. Sec. 2310, Pen. C. 1895; re-en. Sec. 9412, Rev. C. 1907; re-en. Sec. 12122, R. C. M. 1921. Cal. Pen. C. Sec. 1253.

Operation and Effect

The word "argument" means argument, whether written or oral, and where a case has been submitted on briefs, the court is required to decide the cause upon its merits and reverse or affirm the judgment, just as it would have done if there had been a full oral argument, since the statute simply means that if the appellant fails to disclose by appropriate argument wherein the lower court has committed prejudicial error, the judgment may be

affirmed but not reversed. State v. Guerin, 51 M 250, 256, 152 P 747.

Where appellant in a criminal cause fails to file his brief and on the day set for argument no appearance in behalf of either side is made, the judgment appealed from will be affirmed. State v. Cassill, 72 M 381, 382, 233 P 908.

References

Cited or applied as section 9412, Revised Codes, in Roberts v. Sinnott, 54 M 114, 122, 169 P 49.

Criminal Law 1132, 1178.

24 C.J.S. Criminal Law §§ 1829, 1845.

3 Am. Jur. 330, Appeal and Error, §§ 764 et seq.

94-8205. (12123) Number of counsel to be heard. Upon the argument of the appeal, if the offense is punishable with death, two counsel must be heard on each side, if they require it. In any other case the court may, in its discretion, restrict the argument to one counsel on each side.

History: En. Sec. 2311, Pen. C. 1895; re-en. Sec. 9413, Rev. C. 1907; re-en. Sec. 12123, R. C. M. 1921. Cal. Pen. C. Sec. 1254.

94-8206. (12124) Defendant need not be present. The defendant need not personally appear in the appellate court.

History: En. Sec. 2312, Pen. C. 1895; re-en. Sec. 9414, Rev. C. 1907; re-en. Sec. 12124, R. C. M. 1921. Cal. Pen. C. Sec. 1255.

94-8207. (12125) Judgment without regard to technical errors. After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties.

History: En. Sec. 254, p. 255, Bannack Stat.; re-en. Sec. 405, p. 250, Cod. Stat. 1871; re-en. Sec. 405, 3d Div. Rev. Stat. 1879; re-en. Sec. 406, 3d Div. Comp. Stat. 1887; re-en. Sec. 2320, Pen. C. 1895; re-en. Sec. 9415, Rev. C. 1907; re-en. Sec. 12125, R. C. M. 1921. Cal. Pen. C. Sec. 1258.

Improper Evidence and Cross-examination

Errors in the admission of improper evidence or in the permission of improper cross-examination have been held in and of themselves sufficiently prejudicial to justify the reversal of a judgment. *State v. Patton*, 102 M 51, 63, 55 P 2d 1290.

Operation and Effect

Query, as to whether the rule, that "error appearing, prejudice will be presumed," as announced prior to the adoption of the codes in 1895, was abrogated by this section and section 94-6434, which declare the law to be that no judgment shall be held invalid for mere technical errors not affecting the substantial rights of the defendant. *State v. Gordon*, 35 M 458, 466, 90 P 173.

Under this section, the supreme court on appeal in a criminal cause must give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the defendant. *State v. McConville*, 64 M 302, 309, 209 P 987.

Withdrawal of evidence in criminal case, of similar offenses, on motion or by instruction is ineffective to cure prejudice unless supreme court on inspection of record can say that the effect of the evidence was clearly removed; and where a general objection was interposed, failure to move to strike or withdraw it from jury's consideration is immaterial. *State v. Simanton*, 100 M 292, 309, 49 P 2d 981.

Prejudice Cannot be Presumed

Under this section, prejudice to appellant in a criminal cause cannot be presumed, but must be made to appear, either affirmatively by the record, or by a denial or invasion of some substantial right from which the law imputes prejudice. *State v. Hall*, 55 M 182, 188, 175 P 267.

In a prosecution for attempted rape, the introduction in evidence of the clothing worn by the prosecuting witness, though immaterial, was not reversible error, where there was no evidence that the articles were muddy, torn and blood-stained, as claimed, and thus likely to inflame the minds of the jurors, and where the original exhibits were not certified to the supreme court for inspection; prejudice cannot be presumed, but must be made to appear affirmatively. *State v. Prouty*, 60 M 310, 313, 199 P 281; *Lindeberg v. Howe*, 67 M 195, 199, 215 P 230.

Supreme Court to Determine Whether Error Affects Substantial Rights

It is for the supreme court to determine whether an error affects the substantial rights of the defendant. If the point can be decided from an inspection of the record, the court may act accordingly; if the defendant claims prejudice, it is his duty to demonstrate that fact from the record. *State v. Byrd*, 41 M 585, 592, 111 P 407.

Technical Errors Not Affecting the Substantial Rights of the Parties

Where no substantial right of the defendant has been disregarded, a mere apex juris is not sufficient cause for the reversal or modification of the judgment. *State v. Connors*, 27 M 227, 229, 70 P 715.

Where, under the evidence submitted at a trial for assault in the second degree, the defendant might have been convicted of assault in either the second or third degree, but was found guilty of the lower degree, the judgment will not be reversed for a purely technical error in giving an instruction. *State v. Tracey*, 35 M 552, 555, 90 P 791.

An information charging an attempt to obtain money by false pretenses, though defective in form and containing immaterial averments, is sufficient to sustain a conviction, when it is apparent that the defendant has suffered no prejudice. *State v. Phillips*, 36 M 112, 118, 92 P 299.

A technical error in pleading a prior conviction will not work a reversal, if the punishment imposed does not exceed the limit which could properly be imposed. *State v. Paisley*, 36 M 237, 248, 92 P 566.

Where the record in a criminal cause did not show that the jurors were not all present when the verdict was delivered, and from the minutes no other fair inference could be drawn than that they were actually present at the time, the omission from the minutes of a statement that their names were called prior to delivery of the verdict was not an error which prejudiced defendant in his substantial rights. *State v. De Lea*, 36 M 531, 536, 93 P 814.

A judgment of conviction will not be reversed for error in the trial proceedings that did not prejudice, or tend to prejudice, defendant in respect to a substantial right. *State v. Rhys*, 40 M 131, 134, 105 P 494.

Under this section and section 94-6434, a judgment of conviction will not be reversed unless the error prejudiced, or tended to the prejudice of, defendant. *State v. Vanella*, 40 M 326, 345, 106 P 364.

It ought no longer to be the rule in criminal cases in this state that, error being shown, prejudice will be presumed, as was held prior to 1895, when the codes

were adopted. The former practice resulted in altogether too many reversals of criminal cases for technical errors which did not affect the substantial rights of the defendant. *State v. Byrd*, 41 M 585, 592, 111 P 407.

To warrant the supreme court in interfering with the judgment in a criminal case, it must appear that the substantial rights of the defendant have been injuriously affected. *State v. Crean*, 43 M 47, 60, 114 P 603.

Though refusal to strike out an irresponsible answer in which the witness volunteers a statement of facts from which the complaining party has probably suffered prejudice will result in a reversal of the judgment, such refusal is harmless error where the objectionable statement was volunteered on cross-examination after having been twice before made on his direct examination. *State v. Jones*, 48 M 505, 515, 139 P 441.

Where a county attorney violated the express injunction of section 94-6208 by indorsing the name of a witness as "John Doe Mitchell," whereas he knew his true name to be "James Mitchell," defendant was not entitled to a new trial in the absence of a showing that he had been prejudiced by the officer's delinquency. *State v. McDonald*, 51 M 1, 7, 149 P 279.

Under this section the supreme court will not reverse a judgment of conviction on account of technical errors or defects in the information, where defendant was fully advised of the nature of the charge against him to enable him to prepare to meet that charge, and his substantial rights were not affected by the defect. *State v. Wehr*, 57 M 469, 188 P 930.

An erroneous ruling of the court in admitting evidence which could not affect the substantial rights of the parties must be disregarded. *Church v. Zywert*, 58 M 102, 107, 190 P 291.

A remark of the trial judge in passing upon an objection to a question asked a witness for the defense in a criminal cause to the effect: "I don't think that is very material; let him answer," while improper, held technical error and nonprejudicial when considered in connection with the particular circumstances. *State v. Cassill et al.*, 71 M 274, 283, 229 P 716; *State v. Sedlacek*, 74 M 201, 216, 239 P 1002.

Under the rule that the supreme court will not reverse a judgment of conviction for mere technical irregularities not affecting injuriously the substantial rights of appellant, for alleged error in overruling objections to several questions claimed to have been leading but which were of no special importance but merely explanatory in character, a new trial will

not be ordered. *State v. Wong Fong*, 75 M 81, 88, 241 P 1072.

In criminal cases no judgment will be reversed for technical errors or defects which do not affect the substantial rights of the defendant, and where the record is sufficient to establish the guilt of the defendant, a new trial will not be granted, even though there was error, unless it clearly appears that the error complained of actually prejudiced the defendant in his right to a fair trial. *State v. Dixon*, 80 M 181, 213, 260 P 138; *State v. Ray*, 88 M 436, 446, 294 P 368.

Under the above rules, held in a prosecution for receiving stolen property that where a juror on his voir dire in answer to questions propounded by the state admitted that he was a close friend of defendant but could try him as if he were a stranger, but that he would like to be excused, and then stated that he would not convict him even if he believed him guilty beyond a reasonable doubt, thereafter, however, on examination by defendant's counsel, again asserting that he would vote for conviction regardless of his friendship for defendant if proper under the law and the evidence, the court's ruling excusing the juror may not be held reversible error even though it be conceded that technical error was committed in sustaining the challenge on an improper ground. *State v. Huffman*, 89 M 194, 198, 296 P 789.

In a prosecution for the larceny of two calves, refusal of the court to strike the testimony of a cattleman that two cows, the condition of the bags of which indicated that they had lost their calves but a short time theretofore, were acting as though they were looking for them, held not reversible error under the circumstances, among them that defendant killed the calves after being charged with their theft and thus blocked the test proposed by the stock inspector by getting the cows and seeing whether they would claim the calves. *State v. Grimsley*, 96 M 327, 335, 30 P 2d 85.

Where exhibits consisting of photographs of the automobile in which some of the shots resulting in the killing of deceased had been fired and of the body of deceased, a pistol taken from defendant after the shooting, revolver clips, etc., all of which had been admitted in evidence without objection by defendant, were taken to the jury-room, at the close of the trial, apparently without the affirmative consent of defendant and without an order of court permitting it to be done, but there was no showing that by the procedure the jury were given any other information than that obtained at the trial, it may not be presumed that the procedure resulted to the prejudice of the

defendant. *State v. Cates*, 97 M 173, 198, 205, 33 P 2d 578.

Under this case, held, on appeal from a judgment of conviction for forgery, that, while it was error to advise the jury in an instruction as to the purpose for which testimony of other like acts had been admitted, that testimony had been admitted relating to certain "forgeries," since whether or not a forgery had been committed was the fact to be determined by the jury, in view of other portions of the charge carefully safeguarding the rights of defendant, the inadvertent use of the term "forgeries" could not have worked to his prejudice. *State v. Daems*, 97 M 486, 500, 37 P 2d 322.

What are Substantial Rights of Defendant

The presence of defendant at his trial for crime is a matter which affects the substantial rights of both plaintiff and defendant and therefore the provision of this section requiring the supreme court to give judgment on appeal without regard to technical errors or defects not affecting the substantial rights of the parties, has no application. *State v. Reed*, 65 M 51, 61, 210 P 756.

Within the meaning of the rule declared by this section, that the supreme court on

appeal must disregard technical errors or defects which do not go to the substantial rights of the parties, the right of one on trial for crime forbidding his impeachment in any other manner than that prescribed by section 93-1901-11 is a substantial one. *State v. Shannon*, 95 M 280, 292, 26 P 2d 360.

References

Cited or applied as section 2320, Penal Code, in *State v. Mahoney*, 24 M 281, 285, 61 P 647; *State v. Paisley*, 36 M 237, 248, 92 P 566; as section 9415, Revised Codes, in *State v. Crowe*, 39 M 174, 179, 102 P 579; *State v. Murphy*, 46 M 591, 129 P 1058; *State v. Harris*, 51 M 496, 154 P 198; *State v. Russell*, 52 M 583, 160 P 655; *State v. Russell*, 73 M 240, 251, 235 P 712; *State v. McClain et al.*, 76 M 351, 358, 246 P 956; *State v. Fisher*, 79 M 46, 52, 254 P 872; *State v. McComas et al.*, 85 M 428, 435, 278 P 993; *State v. Le Due*, 89 M 545, 580 et seq., 300 P 919; *State v. Stevens*, 104 M 189, 197, 65 P 2d 612; *Doheny v. Coverdale*, 104 M 534, 557, 68 P 2d 142; *State v. Laughlin*, 105 M 490, 496, 73 P 2d 718.

Criminal Law §1186 (4).

24 C.J.S. Criminal Law §1948.

94-8208. (12125.1) Conclusively deemed on appeal that defendant was present at all stages of trial and that court gave proper admonition to jury, when. In all cases appealed to the supreme court from judgment of conviction or upon denial of motions for new trial, unless the record on appeal affirmatively shows to the contrary, it shall be conclusively deemed that the defendant was present in court at all stages of the trial; and unless the record affirmatively shows to the contrary, upon all such appeals, it shall be conclusively deemed that the court or judge gave the proper admonition, in accordance with the provisions of section 94-7231, to the jury at each recess or adjournment of the court, and no case shall be reversed on appeal or motion for new trial because of the mere failure of the record to show the presence of the defendant as aforesaid or the failure of the record to show that such admonition was given to the jury.

History: En. Sec. 1, Ch. 136, L. 1931.

Operation and Effect

Under this section one convicted of crime may not assert prejudicial error on the ground that the record on appeal fails to disclose that he was present at the time the verdict was returned, unless

the record affirmatively shows the contrary, otherwise it must be conclusively deemed that he was present in court at all stages of the trial. *State v. Cates*, 97 M 173, 197, 33 P 2d 578.

Criminal Law §1144 (11, 15).

24 C.J.S. Criminal Law §§1850, 1854.

94-8209. (12126) What may be reviewed on an appeal by the defendant. Upon an appeal taken by the defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment.

History: En. Sec. 2321, Pen. C. 1895; 12126, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9416, Rev. C. 1907; re-en. Sec. 1259.

Construction

This section having been taken verbatim from the California code, it is adopted with the construction placed upon it by the courts of that state. *State v. O'Brien*, 18 M 1, 6, 43 P 1091, 44 P 399; *State v. Brantingham*, 66 M 1, 7, 212 P 499.

Intermediate Orders

An order overruling a motion in arrest of judgment is an intermediate order affecting the judgment, and may be reviewed only on appeal from the judgment. *State v. Beesskov*, 34 M 41, 48, 85 P 376; *State v. Brown*, 38 M 309, 311, 99 P 954.

Operation and Effect

Rulings of the trial court upon matters of law in the exclusion or admission of testimony, during the progress of the trial may be brought before the supreme court by bill of exceptions on an appeal from the judgment without a motion for a new trial; but this section does not permit the review, on an appeal from the judgment only, of matters embraced within any of the cases for which a new trial may be granted, except errors in the decision of questions of law during the trial, which may be reviewed either by appeal from the judgment or from an order denying a motion for a new trial. *State v. O'Brien*, 18 M 1, 5, 6, 43 P 1091, 44 P 399.

The defendant, on appeal from a judgment of conviction, may, by bill of exceptions, bring before the court errors in the decision upon questions of law arising during the course of the trial, exclusive of those embraced within the provisions of the statute providing for new trials. *State v. Francis*, 58 M 659, 666, 194 P 304.

Under this section, the supreme court, on appeal from the judgment, may not review the sufficiency of the evidence to warrant conviction, in the absence of any intermediate order or ruling involving the merits or which may have affected the judgment. *State v. Asher*, 63 M 302, 308, 206 P 1091.

On appeal from the judgment of conviction only, a specification of error based upon the order denying their motion for new trial on the ground of misconduct of one of the jurors, cannot be considered. *State v. Maggert et al.*, 64 M 331, 337, 209 P 989.

On appeal from the judgment of conviction only, an assignment of error for denial of defendant's motion for a new trial cannot be considered. *State v. Ritz*, 65 M 180, 189, 211 P 298.

On appeal from a judgment of conviction under this section, the defendant may by bill of exceptions bring before the supreme court for review any order or ruling of the trial court in admitting or rejecting testimony, or in deciding any question of law not a matter of discretion or in instructing the jury, but the sufficiency of the evidence to justify the verdict may be reviewed only on appeal from an order denying a new trial, unless the record discloses that there is no evidence even remotely to prove the elements of the crime charged. *State v. Smart*, 81 M 145, 148, 262 P 158.

Criminal Law—1134 (10).

24 C.J.S. Criminal Law § 1837.

2 Am. Jur. 934, Appeal and Error, §§ 140-143.

94-8210. (12127) May reverse, affirm or modify the judgment and order a new trial. The court may reverse, affirm, or modify the judgment or order appealed from, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial. In either case the cause must be remanded to the district court with proper instruction, together with the opinion of the court.

History: En. Sec. 403, p. 250, Cod. Stat. 1871; re-en. Sec. 403, 3d Div. Rev. Stat. 1879; re-en. Sec. 404, 3d Div. Comp. Stat. 1887; amd. Sec. 2322, Pen. C. 1895; re-en. Sec. 9417, Rev. C. 1907; re-en. Sec. 12127, R. C. M. 1921. Cal. Pen. C. Sec. 1260.

Operation and Effect

When a judgment of acquittal is reversed on appeal it is proper for the supreme court, under this section, to remand the case to the district court for a new trial, where the defendant may then, if he desires, plead former acquittal in bar of

such new trial. *State v. Herron*, 12 M 300, 30 P 140.

A judgment of conviction for crime, which erroneously included payment by defendant of the costs of prosecution, is not on that account void as a whole; but the same may, under this section, be modified by striking therefrom the provision as to costs, and, as so modified, be allowed to stand. *State v. Stone*, 40 M 88, 93, 105 P 89.

Under this section, providing that the supreme court on appeal in a criminal case may, inter alia, modify a judgment

of conviction, it has the power to reduce a verdict of murder in the first degree to make it fit the crime established by the evidence, to-wit, murder in the second degree. *State v. Gunn*, 89 M 453, 464 et seq., 300 P 212.

Where on appeal in a homicide case three of the justices of the supreme court, a majority, are of the opinion that the trial court committed error resulting in denial of a fair trial to defendant, but are unable to agree as to any one of the grounds urged by him in his assignment of errors being sufficient to warrant a reversal of the judgment, a retrial will be ordered; under such circumstances it is immaterial that the majority do not agree as to any particular error set forth in his

assignment of errors—a mere procedural requirement—the real question being whether or not defendant had a fair trial. *State v. Le Duc*, 89 M 545, 580, 300 P 919.

References

Cited or applied as section 9417, Revised Codes, in *In re Lewis*, 51 M 539, 541, 154 P 713.

Criminal LawⒸ1181, 1189.

24 C.J.S. Criminal Law §§ 1943, 1950.

3 Am. Jur. 664, Appeal and Error, §§ 1152-1267.

Grant of new trial by appellate court because of inability to perfect record for appeal. 13 ALR 107.

94-8211. (12128) New trial, where to be had. When a new trial is ordered it must be directed to be had in the court of the county from which the appeal was taken.

History: En. Sec. 2323, Pen. C. 1895; re-en. Sec. 9418, Rev. C. 1907; re-en. Sec. 12128, R. C. M. 1921. Cal. Pen. C. Sec. 1261.

3 Am. Jur. 719, Appeal and Error, §§ 1218 et seq.

94-8212. (12129) Defendant discharged on reversal of judgment. If a judgment against the defendant is reversed without ordering a new trial, the appellate court must, if he is in custody, direct him to be discharged therefrom; or if on bail, that his bail be exonerated; or if money was deposited instead of bail, that it be refunded to the defendant.

History: En. Sec. 2324, Pen. C. 1895; re-en. Sec. 9419, Rev. C. 1907; re-en. Sec. 12129, R. C. M. 1921. Cal. Pen. C. Sec. 1262.

Code, in *State v. Mjelde*, 29 M 490, 75 P 87.

Criminal LawⒸ1186 (7).

24 C.J.S. Criminal Law § 1949.

3 Am. Jur. 690, Appeal and Error, §§ 1184 et seq.

References

Cited or applied as section 2324, Penal

94-8213. (12130) Judgment to be executed on affirmance. If a judgment against the defendant is affirmed the original judgment must be enforced.

History: En. Sec. 256, p. 255, Bannack Stat.; re-en. Sec. 407, p. 250, Cod. Stat. 1871; re-en. Sec. 407, 3d Div. Rev. Stat. 1879; re-en. Sec. 408, 3d Div. Comp. Stat. 1887; amd. Sec. 2325, Pen. C. 1895; re-en. Sec. 9420, Rev. C. 1907; re-en. Sec. 12130, R. C. M. 1921. Cal. Pen. C. Sec. 1263.

Code, in *State v. Cadotte*, 17 M 315, 321, 42 P 857.

Criminal LawⒸ1182.

24 C.J.S. Criminal Law § 1945.

3 Am. Jur. 673, Appeal and Error, §§ 1163 et seq.

References

Cited or applied as section 2325, Penal

94-8214. (12131) Judgment of appellate court, how entered and remitted. When the judgment of the appellate court is given, it must be entered in the minutes, and a certified copy of the entry forthwith remitted to the clerk of the court from which the appeal was taken.

History: En. Sec. 2326, Pen. C. 1895; re-en. Sec. 9421, Rev. C. 1907; re-en. Sec. 12131, R. C. M. 1921. Cal. Pen. C. Sec. 1264.

Criminal LawⒸ1191.

24 C.J.S. Criminal Law § 1944.

3 Am. Jur. 712, Appeal and Error, §§ 1210 et seq.

94-8215. (12132) Jurisdiction ceases after judgment remitted. After the certificate of the judgment has been remitted to the court below, the appellate court has no further jurisdiction of the appeal or of the proceedings thereon, and all orders necessary to carry the judgment into effect must be made by the court to which the certificate is remitted.

History: En. Sec. 2327, Pen. C. 1895; Code, in *State v. Cadotte*, 17 M 315, 321, re-en. Sec. 9422, Rev. C. 1907; re-en. Sec. 42 P 857; *State ex rel. Bottomly v. District Court*, 73 M 541, 544, 237 P 525. 12132, R. C. M. 1921. Cal. Pen. C. Sec. 1265.

References

Cited or applied as section 2327, Penal

Criminal Law 1193.

24 C.J.S. Criminal Law § 1953.

CHAPTER 83

IN WHAT CASES DEFENDANT MAY BE ADMITTED TO BAIL

- Section 94-8301. Admission to bail defined.
 94-8302. Taking of bail defined.
 94-8303. Offense not bailable.
 94-8304. Defendant, when admitted to bail before conviction.
 94-8305. When admitted to bail after conviction and upon appeal.
 94-8306. Nature of bail.
 94-8307. When bail is matter of discretion, notice of application must be given to county attorney.

94-8301. (12133) Admission to bail defined. Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon bail.

History: En. Sec. 236, p. 226, Cod. Stat. 1871; re-en. Sec. 236, 3d Div. Rev. Stat. 1879; re-en. Sec. 237, 3d Div. Comp. Stat. 1887; re-en. Sec. 2340, Pen. C. 1895; re-en. Sec. 9440, Rev. C. 1907; re-en. Sec. 12133, R. C. M. 1921. Cal. Pen. C. Sec. 1268.

References

State ex rel. Bottomly v. District Court, 73 M 541, 544, 237 P 525; *Kirschbaum v. Mayn*, 76 M 320, 328, 246 P 953.

Amount of bail required in criminal action. 53 ALR 399.

Supersedeas, stay, or bail, upon appeal in habeas corpus. 63 ALR 1460 and 143 ALR 1354.

Factors in fixing amount of bail in criminal cases. 72 ALR 801.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment. 79 ALR 13.

Rape as bailable offense. 118 ALR 1115.

Validity, construction, and application of statutes regulating bail bond business. 123 ALR 1215.

Constitutional or statutory provisions regarding release on bail as applicable to children subject to Juvenile Delinquency Act. 160 ALR 287.

Bail 49.
 8 C.J.S. Bail §§ 34, 36, 44.
 6 Am. Jur. 50, Bail and Recognizance, §§ 6 et seq.

Constitutional right to bail pending appeal from conviction. 19 ALR 807 and 77 ALR 1235.

Bail pending appeal from conviction. 45 ALR 458.

94-8302. (12134) Taking of bail defined. The taking of bail consists in the acceptance, by a competent court or magistrate, or legally authorized officer, of the undertaking of sufficient bail for the appearance of the defendant, according to the terms of the undertaking, or that the bail will pay to the state a specified sum.

History: En. Sec. 237, p. 226, Cod. Stat. 1879; re-en. Sec. 238, 3d Div. Comp. Stat. 1871; re-en. Sec. 227, 3d Div. Rev. Stat. 1887; amd. Sec. 2341, Pen. C. 1895; re-en.

Sec. 9441, Rev. C. 1907; re-en. Sec. 12134,
R. C. M. 1921. Cal. Pen. C. Sec. 1269.

References

Kirschbaum v. Mayn, 76 M 320, 328, 246
P 953.

94-8303. (12135) Offense not bailable. A defendant charged with an offense punishable with death cannot be admitted to bail when the proof of his guilt is evident or the presumption thereof great. The finding of an indictment or the filing of an information does not add to the strength of the proof or the presumptions to be drawn therefrom.

History: Ap. p. Secs. 112-238, pp. 207-227, Cod. Stat. 1871; re-en. Secs. 112-238, 3d Div. Rev. Stat. 1879; re-en. Secs. 112-239, 3d Div. Comp. Stat. 1887; en. Sec. 2342, Pen. C. 1895; re-en. Sec. 9442, Rev. C. 1907; re-en. Sec. 12135, R. C. M. 1921. Cal. Pen. C. Sec. 1270.

Bail ⇨ 43.

8 C.J.S. Bail §§ 34, 35.

6 Am. Jur. 55, Bail and Recognizance, §§ 16-22.

94-8304. (12136) Defendant, when admitted to bail before conviction. If the charge is for any other offense, he may be admitted to bail before conviction, as a matter of right.

History: Ap. p. Secs. 112-238, pp. 207-227, Cod. Stat. 1871; re-en. Secs. 112-238, 3d Div. Rev. Stat. 1879; re-en. Secs. 112-239, 3d Div. Comp. Stat. 1887; en. Sec. 2343, Pen. C. 1895; re-en. Sec. 9443, Rev.

C. 1907; re-en. Sec. 12136, R. C. M. 1921. Cal. Pen. C. Sec. 1271.

Bail ⇨ 42.

8 C.J.S. Bail §§ 34-37.

94-8305. (12137) When admitted to bail after conviction and upon appeal. After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail—

1. As a matter of right, when the appeal is from a judgment imposing a fine only;

2. As a matter of discretion in all other cases.

History: En. Sec. 241, p. 227, Cod. Stat. 1871; re-en. Sec. 241, 3d Div. Rev. Stat. 1879; re-en. Sec. 242, 3d Div. Comp. Stat. 1887; re-en. Sec. 2344, Pen. C. 1895; re-en. Sec. 9444, Rev. C. 1907; re-en. Sec. 12137, R. C. M. 1921. Cal. Pen. C. Sec. 1272.

Bail ⇨ 44.

8 C.J.S. Bail § 36.

6 Am. Jur. 60, Bail and Recognizance, §§ 27-29.

Bail pending appeal from conviction. 45 ALR 458.

References

State v. Harkins, 85 M 585, 591, 281 P 551.

94-8306. (12138) Nature of bail. If the offense is bailable, the defendant may be admitted to bail before conviction—

1. For his appearance before the magistrate during the pendency of a trial or on the examination of the charge, before being held to answer;

2. To appear at the court to which the magistrate is required to return the complaint, testimony and statement, upon the defendant being held to answer after examination;

3. After indictment or information filed, either before the warrant is issued for his arrest, or upon any order of the court committing him, or enlarging the amount of bail, or upon his being surrendered by his bail to answer the indictment or information in the court in which it is found or filed, or to which it may be transferred for trial.

And after conviction, and upon an appeal—

1. If the appeal is from a judgment imposing a fine only, on the undertaking of bail that he will pay the same or such part thereof as the appellate court may direct, if the judgment is affirmed or modified, or the appeal is dismissed;

2. If the judgment of imprisonment has been given, that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that in case the judgment be reversed, and that the cause be remanded for a new trial, that he will appear in the court to which said cause may be remanded, and submit himself to the orders and process thereof.

History: En. Secs. 242, 243, p. 227, Cod. Stat. 1871; re-en. Secs. 242, 243, 3d Div. Rev. Stat. 1879; re-en. Secs. 243, 244, 3d Div. Comp. Stat. 1887; amd. Sec. 2345, Pen. C. 1895; re-en. Sec. 9445, Rev. C. 1907; re-en. Sec. 12138, R. C. M. 1921. Cal. Pen. C. Sec. 1273.

References

State v. Harkins, 85 M 585, 591, 281 P 551.

94-8307. (12139) When bail is matter of discretion, notice of application must be given to county attorney. When the admission to bail is a matter of discretion the court or officer to whom the application is made must require reasonable notice thereof to be given to the county attorney of the county.

History: En. Sec. 240, p. 227, Cod. Stat. 1871; re-en. Sec. 240, 3d Div. Rev. Stat. 1879; re-en. Sec. 241, 3d Div. Comp. Stat. 1887; amd. Sec. 2346, Pen. C. 1895; re-en. Sec. 9446, Rev. C. 1907; re-en. Sec. 12139, R. C. M. 1921. Cal. Pen. C. Sec. 1274.

CHAPTER 84

BAIL ON BEING HELD TO ANSWER BEFORE INFORMATION

- Section 94-8401. What magistrates may admit to bail.
 94-8402. Bail, how put in, and form of the undertaking.
 94-8403. Qualifications of bail.
 94-8404. Bail, how to justify.
 94-8405. On allowance of bail, defendant to be discharged.

94-8401. (12140) What magistrates may admit to bail. When the defendant has been held to answer upon an examination for a public offense, the admission to bail may be by the magistrate by whom he is so held, or by any magistrate who has power to issue the writ of habeas corpus.

History: En. Sec. 239, p. 227, Cod. Stat. 1871; re-en. Sec. 239, 3d Div. Rev. Stat. 1879; re-en. Sec. 240, 3d Div. Comp. Stat. 1887; amd. Sec. 2350, Pen. C. 1895; re-en. Sec. 9447, Rev. C. 1907; re-en. Sec. 12140, R. C. M. 1921. Cal. Pen. C. Sec. 1277.

Operation and Effect

This section means that the committing magistrate may approve and accept the undertaking which he has himself required by his order made upon holding the defendant to answer. Any other construction of this statute would, at times, infringe seriously upon a prisoner's right to be admitted to bail. State v. Lagoni, 30 M 472, 479, 76 P 1044.

Id. The committing magistrate may approve and accept the undertaking which he himself required by his order upon holding the defendant to answer, and has the power and authority to accept and approve the bond until the district court obtains final jurisdiction of the entire matter upon the filing of an information or the presentment of an indictment, or until the judge of the district or a justice of the supreme court has fixed anew the prisoner's bail.

An order allowing bail in a homicide case is probably made, in the absence of a showing, by the county attorney, that the proof of the defendant's guilt was evident or the presumption thereof great. State

ex rel. Murray v. District Court, 35 M 8 C.J.S. Bail § 39.
 504, 507, 90 P 513. 6 Am. Jur. 67, Bail and Recognizance,
 Bail 47. §§ 40 et seq.

94-8402. (12141) Bail, how put in, and form of the undertaking. Bail is put in by a written undertaking, executed by two sufficient sureties (with or without the defendant, in the discretion of the magistrate), and acknowledged before the court or magistrate, in substantially the following form:

"An order having been made on the day of A. D. nineteen hundred and, by A B, a justice of the peace of county (or as the case may be), that C D be held to answer upon a charge of (stating briefly the nature of the offense), upon which he has been admitted to bail in the sum of dollars; we, E F and G H (stating their place of business and occupation), hereby undertake that the above-named C D will appear and answer the charge above mentioned, in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court, and if convicted, will appear for judgment, and render himself in execution thereof; or, if he fails to perform either of these conditions, that we will pay to the state of Montana the sum of dollars (inserting the sum in which the defendant is admitted to bail)."

History: Ap. p. Sec. 244, p. 227, Cod. Stat. 1871; re-en. Sec. 244, 3d Div. Rev. Stat. 1879; re-en. Sec. 245, 3d Div. Comp. Stat. 1887; en. Sec. 2351, Pen. C. 1895; re-en. Sec. 9448, Rev. C. 1907; re-en. Sec. 12141, R. C. M. 1921. Cal. Pen. C. Sec. 1278.

References

Cited or applied as section 2351, Penal Code, in State v. Lagoni, 30 M 472, 474, 76 P 1044; Hassan v. Earll, 61 M 389, 393, 202 P 581; County of Wheatland v. Van et al., 64 M 113, 207 P 1003.

Bail 55.
 8 C.J.S. Bail §§ 29, 55, 56, 64.
 6 Am. Jur. 78, Bail and Recognizance, §§ 74 et seq.
 Liability on bail bond taken without authority. 34 ALR 612.

Necessity of acknowledgment of bail bond in open court. 38 ALR 1108.

Necessity of reference to specific crime in bail bond. 103 ALR 535.

94-8403. (12142) Qualifications of bail. The qualifications of bail are as follows:

1. Each of them must be a resident, householder, or freeholder within the state, but the court or magistrate may refuse to accept any person as bail who is not a resident of the county where bail is offered.

2. They must each be worth the amount specified in the undertaking, exclusive of property exempt from execution; but the court or magistrate, on taking bail, may allow more than two sureties to justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to that of sufficient bail.

History: En. Sec. 245, p. 228, Cod. Stat. 1871; re-en. Sec. 245, 3d Div. Rev. Stat. 1879; re-en. Sec. 246, 3d Div. Comp. Stat. 1887; amd. Sec. 2352, Pen. C. 1895; re-en. Sec. 9449, Rev. C. 1907; re-en. Sec. 12142, R. C. M. 1921. Cal. Pen. C. Sec. 1279.

References

County of Wheatland v. Van et al., 64 M 113, 116, 207 P 1003.

Bail 60.

8 C.J.S. Bail § 60.

Lien or encumbrance on his real property as affecting qualification of surety on bail bond. 56 ALR 1097.

94-8404. (12143) Bail, how to justify. The bail must in all cases justify by affidavit taken before the magistrate that they each possess the qualifications provided in the preceding section. The magistrate may further examine the bail upon oath concerning their sufficiency, in such manner as he may deem proper.

History: En. Sec. 246, p. 228, Cod. Stat. 1871; re-en. Sec. 246, 3d Div. Rev. Stat. 1879; re-en. Sec. 247, 3d Div. Comp. Stat. 1887; amd. Sec. 2353, Pen. C. 1895; re-en.

Sec. 9450, Rev. C. 1907; re-en. Sec. 12143, R. C. M. 1921. Cal. Pen. C. Sec. 1280.

Bail 49.

8 C.J.S. Bail §§ 34, 36, 44.

94-8405. (12144) On allowance of bail, defendant to be discharged. Upon the allowance of bail and the execution of the undertaking, the magistrate must, if the defendant is in custody, make and sign an order for his discharge, upon the delivery of which to the proper officer the defendant must be discharged.

History: En. Sec. 2354, Pen. C. 1895; re-en. Sec. 9451, Rev. C. 1907; re-en. Sec. 12144, R. C. M. 1921. Cal. Pen. C. Sec. 1281.

bal order of release, instead of complying with this section, was no defense to a surety in an action on the bail bond. State v. Lagoni, 30 M 472, 481, 76 P 1044.

Operation and Effect

The fact that a magistrate made a ver-

6 Am. Jur. 85, Bail and Recognizance, §§ 93 et seq.

CHAPTER 85

BAIL ON INDICTMENT OR INFORMATION BEFORE CONVICTION

- Section 94-8501. When the offense is not capital.
 94-8502. Clerk must indorse warrant.
 94-8503. When the offense is capital.
 94-8504. Bail on habeas corpus.
 94-8505. Form of undertaking.
 94-8506. Sections applicable to qualifications, etc.
 94-8507. Increase or reduction of bail.

94-8501. (12145) When the offense is not capital. When the offense charged is not punishable with death, the court at the time the indictment is presented and filed, or information filed, must make an order, to be entered in the minutes, fixing the amount in which the defendant may be admitted to bail, unless the court indorse such order on the warrant.

History: En. Sec. 2360, Pen. C. 1895; re-en. Sec. 9452, Rev. C. 1907; re-en. Sec. 12145, R. C. M. 1921. Cal. Pen. C. Sec. 1284.

Factors in fixing amount of bail in criminal cases. 72 ALR 801.

6 Am. Jur. 51, Bail and Recognizance, §§ 9 et seq.

Denial of opportunity to give bail as supporting action for false imprisonment. 79 ALR 13.

Bail pending appeal from conviction. 45 ALR 458.

Rape asailable offense. 118 ALR 1115.

94-8502. (12146) Clerk must indorse warrant. When the order fixing the amount of the bail is entered in the minutes, the clerk must indorse the same on the warrant.

History: En. Sec. 2361, Pen. C. 1895; re-en. Sec. 9453, Rev. C. 1907; re-en. Sec. 12146, R. C. M. 1921.

94-8503. (12147) When the offense is capital. If the offense charged is punishable with death, the officer arresting the defendant must deliver him into custody, according to the command of the warrant.

History: En. Sec. 2362, Pen. C. 1895; Bail 43.
re-en. Sec. 9454, Rev. C. 1907; re-en. Sec. 8 C.J.S. Bail §§ 34, 35.
12147, R. C. M. 1921. Cal. Pen. C. Sec. 1285.

94-8504. (12148) Bail on habeas corpus. When the defendant is so delivered into custody, he must be held by the sheriff, unless admitted to bail on examination upon a writ of habeas corpus.

History: En. Sec. 2363, Pen. C. 1895; 39 C.J.S. Habeas Corpus §§ 34, 35.
re-en. Sec. 9455, Rev. C. 1907; re-en. Sec. 6 Am. Jur. 63, Bail and Recognizance,
12148, R. C. M. 1921. Cal. Pen. C. Sec. 1286. § 30.

Habeas Corpus 33.

Supersedeas, stay or bail, upon appeal in habeas corpus. 63 ALR 1460 and 143 ALR 1354.

94-8505. (12149) Form of undertaking. The bail must be put in by a written undertaking, executed by two sufficient sureties (with or without the defendant, in the discretion of the court or magistrate) and acknowledged before the court or magistrate, in substantially the following form:

"An indictment (or information) having been found (or filed) on the day of, A. D. nineteen hundred and, in the district court of the district, in and for the county of, charging A B with the crime of (designating it generally), and he having been admitted to bail in the sum of dollars, we, C D and E F, of (stating their place of residence and occupation), hereby undertake that the above-named A B will appear and answer the indictment (or information) above mentioned, in whatever court it may be prosecuted, and will, at all times, render himself amenable to the orders and process of the court, and, if convicted, will appear for judgment and render himself in execution therefor; or, if he fails to perform either of these conditions, that we will pay to the state of Montana the sum of dollars (inserting the sum in which the defendant is admitted to bail)."

History: En. Sec. 2364, Pen. C. 1895; Bail 55.
re-en. Sec. 9456, Rev. C. 1907; re-en. Sec. 8 C.J.S. Bail §§ 29, 55, 56, 64.
12149, R. C. M. 1921. Cal. Pen. C. Sec. 1287. 6 Am. Jur. 78, Bail and Recognizance,
§§ 74 et seq.

94-8506. (12150) Sections applicable to qualifications, etc. The provisions contained in sections 94-8403, 94-8404 and 94-8405 apply to bail after indictment or information.

History: En. Sec. 2365, Pen. C. 1895; Bail 49.
re-en. Sec. 9457, Rev. C. 1907; re-en. Sec. 8 C.J.S. Bail §§ 34, 36, 44.
12150, R. C. M. 1921. Cal. Pen. C. Sec. 1288.

94-8507. (12151) Increase or reduction of bail. After a defendant has been admitted to bail upon an indictment or information, the court in which the charge is pending may, upon good cause shown, either increase or reduce the amount of bail. If the amount be increased, the court may order the defendant to be committed to actual custody, unless he give bail in such increased amount. If application be made by the defendant for a

reduction of the amount, notice of the application must be served upon the county attorney.

History: En. Sec. 2366, Pen. C. 1895; re-en. Sec. 9458, Rev. C. 1907; re-en. Sec. 12151, R. C. M. 1921. Cal. Pen. C. Sec. 1289.

Bail—53.
8 C.J.S. Bail § 51.
6 Am. Jur. 73, Bail and Recognizance,
§§ 54 et seq.

CHAPTER 86

BAIL ON APPEAL—DEPOSIT IN LIEU OF BAIL

Section 94-8601. Who may admit to bail.
94-8602. Bail, qualifications of and condition of undertaking.
94-8603. Deposit, when and how made.
94-8604. Exoneration of bail by deposit.
94-8605. Deposit to be applied to payment of judgment and fine.

94-8601. (12152) Who may admit to bail. In cases in which defendant may be admitted to bail upon an appeal, the order admitting him to bail may be made by any magistrate having the power to issue a writ of habeas corpus, or by the magistrate before whom the trial was had.

History: En. Sec. 2370, Pen. C. 1895; re-en. Sec. 9459, Rev. C. 1907; re-en. Sec. 12152, R. C. M. 1921. Cal. Pen. C. Sec. 1291.

Constitutional right to bail pending appeal from conviction. 19 ALR 807 and 77 ALR 1235.

Bail—47.
8 C.J.S. Bail § 39.
6 Am. Jur. 67, Bail and Recognizance,
§§ 40 et seq.

Bail pending appeal from conviction. 45 ALR 458.

Supersedeas, stay or bail, upon appeal in habeas corpus. 63 ALR 1460 and 143 ALR 1354.

94-8602. (12153) Bail, qualifications of and condition of undertaking. The bail must possess the qualifications, and must be put in, in all respects, as provided in sections 94-8401 to 94-8405, except that the undertaking must be conditioned as prescribed in section 94-8306, for undertaking of bail on appeal.

History: En. Sec. 2371, Pen. C. 1895; re-en. Sec. 9460, Rev. C. 1907; re-en. Sec. 12153, R. C. M. 1921. Cal. Pen. C. Sec. 1292.

Bail—49, 64.

8 C.J.S. Bail §§ 34, 36, 44, 65-67.

94-8603. (12154) Deposit, when and how made. The defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the clerk of the court in which he is held to answer the sum mentioned in the order, and, upon delivering to the officer in whose custody he is a certificate of the deposit, he must be discharged from custody.

History: En. Sec. 118, p. 235, Bannack Stat.; re-en. Sec. 249, p. 228, Cod. Stat. 1871; re-en. Sec. 249, 3d Div. Rev. Stat. 1879; re-en. Sec. 250, 3d Div. Comp. Stat. 1887; amd. Sec. 2380, Pen. C. 1895; re-en. Sec. 9461, Rev. C. 1907; re-en. Sec. 12154, R. C. M. 1921. Cal. Pen. C. Sec. 1295.

Operation and Effect

Where plaintiff in an action in claim and delivery against a clerk of the district court to recover possession of Liberty bonds deposited as bail for one accused of crime and subsequently declared for-

feited, brought on the theory that the deposit was unauthorized under this section, under which the clerk could accept only money, had stipulated at the time bail was furnished that the bonds were substantially the equivalent of the amount fixed as bail in money or cash, she was estopped to assert otherwise. *Kirschbaum v. Mayn*, 76 M 320, 329, 246 P 953.

Id. Where a prisoner for whom bail was furnished by plaintiff by a deposit of Liberty bonds was in court in the custody of the sheriff and released at once, the fact that a certificate of the deposit

was not delivered to the officer as required by this section as authority for releasing him, was immaterial.

Bail—73.
8 C.J.S. Bail §§ 52, 53.
6 Am. Jur. 76, Bail and Recognizance,
§§ 69-73.

94-8604. (12155) Exoneration of bail by deposit. If the defendant has given bail, he may, at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned therein, and upon the deposit being made the bail is exonerated.

History: En. Sec. 2381, Pen. C. 1895;
re-en. Sec. 9462, Rev. C. 1907; re-en. Sec.
12155, R. C. M. 1921. Cal. Pen. C. Sec. 1296.

94-8605. (12156) Deposit to be applied to payment of judgment and fine. When money has been deposited, if it remains on deposit at the time of a judgment for the payment of a fine, the clerk must, under direction of the court, apply the money in satisfaction thereof, and, after satisfying the fine and costs, must refund the surplus, if any, to the defendant.

History: En. Sec. 2382, Pen. C. 1895; **References**
re-en. Sec. 9463, Rev. C. 1907; re-en. Sec. State v. Fowler, 59 M 346, 358, 196 P
12156, R. C. M. 1921. Cal. Pen. C. Sec. 992.
1297.

CHAPTER 87

SURRENDER OF DEFENDANT—FORFEITURE OF BAIL—RECOMMITMENT OF DEFENDANT

- Section 94-8701. Surrender, by whom, when and how made.
94-8702. Defendant, how surrendered.
94-8703. Return of deposit on surrender.
94-8704. How forfeited and how forfeiture discharged.
94-8705. Default of person under bail.
94-8706. Surety, how discharged.
94-8707. What will not bar action on bond.
94-8708. Forfeiture to be enforced by action.
94-8709. Liability of real estate.
94-8710. Deposit, when forfeited, how disposed of.
94-8711. Arrest of defendant, in what cases.
94-8712. Contents of order.
94-8713. Defendant may be arrested in any county.
94-8714. If for failure to appear, defendant must be committed.
94-8715. If for other cause, he may be admitted to bail.
94-8716. Bail in such case, by whom taken.
94-8717. Form of the undertaking.
94-8718. Bail must possess what qualifications and how put in.

94-8701. (12157) Surrender, by whom, when and how made. At any time before the forfeiture of their undertaking the bail may surrender the defendant in their exoneration, or he may surrender himself to the officer to whose custody he was committed at the time of giving bail, in the following manner:

1. A certified copy of the undertaking of the bail must be delivered to the officer, who must detain the defendant in his custody thereon, as upon a commitment, and by a certificate in writing acknowledging the surrender.

2. Upon the undertaking and certificate of the officer, the court in which the action or appeal is pending may, upon notice of five days to the

county attorney, with a copy of the undertaking and certificate, order that the bail be exonerated, and, on filing the order and the papers used on the application, they are exonerated accordingly.

History: Earlier acts were Secs. 120-123, p. 235, Bannack Stat.; re-en. Secs. 251-254, p. 228, Cod. Stat. 1871; re-en. Secs. 251-254, 3d Div. Rev. Stat. 1879; re-en. Secs. 252-255, 3d Div. Comp. Stat. 1887.

This section en. Sec. 2390, Pen. C. 1895; re-en. Sec. 9464, Rev. C. 1907; re-en. Sec. 12157, R. C. M. 1921. Cal. Pen. C. Sec. 1300.

Bail—80.

8 C.J.S. Bail §§ 87, 92.

6 Am. Jur. 109, Bail and Recognizance, §§ 157 et seq.

Surrender of principal by sureties on bail bond. 3 ALR 180.

Right of bail to relief from forfeiture of bond or recognizance in event of subsequent surrender or production of principal. 84 ALR 420.

94-8702. (12158) Defendant, how surrendered. For the purpose of surrendering the defendant, the bail, at any time before they are finally discharged, and at any place within the state, may themselves arrest him, or by a written authority indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

History: En. Sec. 2391, Pen. C. 1895; re-en. Sec. 9465, Rev. C. 1907; re-en. Sec. 12158, R. C. M. 1921. Cal. Pen. C. Sec. 1301.

6 Am. Jur. 112, Bail and Recognizance, §§ 165 et seq.

94-8703. (12159) Return of deposit on surrender. If money has been deposited instead of bail, and the defendant, at any time before the forfeiture thereof, surrenders himself to the officer to whom the commitment was directed, in the manner provided in the last two sections, the court must order a return of the deposit to the defendant, upon producing the certificate of the officer showing the surrender, and upon a notice of five days to the county attorney, with a copy of the certificate.

History: En. Sec. 2392, Pen. C. 1895; re-en. Sec. 9466, Rev. C. 1907; re-en. Sec. 12159, R. C. M. 1921. Cal. Pen. C. Sec. 1302.

Bail—73.

8 C.J.S. Bail §§ 52, 53.

94-8704. (12160) How forfeited and how forfeiture discharged. If, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes, and the undertaking of bail, or the money deposited instead of bail, as the case may be, is thereupon forfeited. But if at any time before the final adjournment of the court, the defendant or his bail appear and satisfactorily excuse his neglect, the court may direct the forfeiture of the undertaking, or the deposit to be discharged upon such terms as may be just.

History: Ap. p. Sec. 124, p. 236, Bannack Stat.; re-en. Sec. 255, p. 229, Cod. Stat. 1871; re-en. Sec. 255, 3d Div. Rev. Stat. 1879; re-en. Sec. 256, 3d Div. Comp. Stat. 1887; en. Sec. 2400, Pen. C. 1895; re-en. Sec. 9467, Rev. C. 1907; re-en. Sec. 12160, R. C. M. 1921. Cal. Pen. C. Sec. 1305.

Operation and Effect

In a suit to recover the amount of a bond given under this section for failure

of a defendant to appear at the district court in accordance with the condition of the bond, it is not necessary to allege in the complaint that the defendant made default of appearance "without excuse." *State v. Wrote*, 19 M 209, 47 P 898.

Where, in an action on a bail bond, it was shown that an information was filed against the defendant, charging him with a crime, and that he failed to appear and answer, and that the court thereupon ordered the bond forfeited, this section was

sufficiently complied with. *State v. Lagoni*, 30 M 472, 480, 76 P 1044.

Bail—73, 77 (2), 79 (1).

8 C.J.S. Bail §§ 52, 53, 85, 89, 91, 92.

6 Am. Jur. 115, Bail and Recognizance, §§ 172 et seq.

Induction of principal into military or naval service as exonerating his bail for his nonappearance. 8 ALR 371.

Variance between name in bail bond and in judgment of forfeiture. 20 ALR 411.

Imprisonment of principal in another jurisdiction as releasing sureties on his bail bond. 26 ALR 412.

Constitutionality of statute relieving against forfeiture of bail or recognizance. 43 ALR 1233.

Right of bail to relief from forfeiture of bond or recognizance in event of subsequent surrender or production of principal. 84 ALR 420.

Excuse for failure of accused to appear which will entitle surety to relief from forfeiture. 84 ALR 440, 443.

Failure of judgment or order forfeiting bail, or deposit in lieu thereof, to recite arraignment and plea. 90 ALR 298.

94-8705. (12161) Default of person under bail. When any person under bond or undertaking in any criminal action or proceeding, either to appear and answer, or to prosecute an appeal, or to testify in any court, fails to perform the condition of such bond or undertaking, his default must be entered in the minutes, and judgment entered against him for the amount of such bond or undertaking, and proceedings may be taken to recover judgment against any or all of the sureties thereto in any court having jurisdiction.

History: En. Sec. 2401, Pen. C. 1895; re-en. Sec. 9468, Rev. C. 1907; re-en. Sec. 12161, R. C. M. 1921.

Operation and Effect

While the district court may, under this section, summarily enter judgment against the person charged with crime who fails

to appear according to the condition of his bond, it exceeds its jurisdiction when it goes further than to authorize proceedings by the county attorney against the sureties by proper action, and at once enters judgment against them for the amount of the bond. *State ex rel. Van v. District Court*, 54 M 577, 579, 172 P 540.

94-8706. (12162) Surety, how discharged. Any surety on such bond or undertaking may be discharged from any liability thereon, at any time before final judgment against him, upon surrendering to the court or the proper officer the principal in such bond or undertaking, or by paying to the clerk of the court the amount for which he was bound as surety, with such costs as the court shall direct.

History: En. Sec. 2402, Pen. C. 1895; re-en. Sec. 9469, Rev. C. 1907; re-en. Sec. 12162, R. C. M. 1921.

References

Cited or applied as section 9469, Revised Codes, in *State ex rel. Van v. District Court*, 54 M 577, 579, 172 P 540.

Bail—74 (1), 80.

8 C.J.S. Bail §§ 76, 87, 92.

6 Am. Jur. 105, Bail and Recognizance, §§ 144 et seq.

Passing indictment to the files as discharging bail. 18 ALR 1154.

Stage of proceedings at which sureties on bail bond are discharged in criminal case. 20 ALR 594.

Imprisonment of principal in another jurisdiction as releasing surety on bail bond. 26 ALR 412.

Escape of principal during his detention on separate charge as affecting liability of bail. 45 ALR 1037.

94-8707. (12163) What will not bar action on bond. No action brought on a bond or undertaking is barred or defeated, nor shall judgment thereon be arrested by reason of any neglect or omission to note or record the default of any principal or surety at the term or session when such default happened, nor by reason of any defect in the form of the bond or undertaking, if it sufficiently appears, from the tenor thereof, at what court the party

or witness was bound to appear, and that the court or magistrate before whom it was taken was authorized by law to require and take the same.

History: En. Sec. 2403, Pen. C. 1895; in the district court was equivalent to an averment that his default for not appearing was entered of record. *State v. Wrote*, 12163, R. C. M. 1921. 19 M 209, 47 P 898.

Operation and Effect

An averment in the complaint that the defendant was called and failed to appear Bail \Leftrightarrow 84.
8 C.J.S. Bail § 97.

94-8708. (12164) Forfeiture to be enforced by action. If the forfeiture is not discharged, as provided in this article, the county attorney may at any time proceed by action only against the bail upon their undertaking.

History: En. Sec. 2404, Pen. C. 1895; Codes, in *State ex rel. Van v. District Court*, 54 M 577, 579, 172 P 540.
re-en. Sec. 9471, Rev. C. 1907; re-en. Sec. 12164, R. C. M. 1921. Cal. Pen. C. Sec. 1306. Bail \Leftrightarrow 83.
8 C.J.S. Bail § 96.

References

Cited or applied as section 9471, Revised §§ 191 et seq. 6 Am. Jur. 121, Bail and Recognizance,

94-8709. (12165) Liability of real estate. The real estate of all persons who sign or enter into any undertaking for the appearance of a person charged with any criminal offense is liable for the payment of any judgment which may be recovered thereon, and the judgment is a lien upon the property from the date of the undertaking. Nothing in this section prohibits the issuing of execution and the enforcing the collection thereof out of any other property of the sureties.

History: En. Sec. 2405, Pen. C. 1895; Bail \Leftrightarrow 93.
re-en. Sec. 9472, Rev. C. 1907; re-en. Sec. 8 C.J.S. Bail §§ 89, 106.
12165, R. C. M. 1921.

94-8710. (12166) Deposit, when forfeited, how disposed of. If, by reason of the neglect of the defendant to appear, money deposited instead of bail is forfeited, and the forfeiture is not discharged or remitted, the clerk with whom it is deposited must, immediately after the final adjournment of the court for the term or session, pay over the money deposited to the county treasurer.

History: En. Sec. 2406, Pen. C. 1895; Bail \Leftrightarrow 73.
re-en. Sec. 9473, Rev. C. 1907; re-en. Sec. 8 C.J.S. Bail §§ 52, 53.
12166, R. C. M. 1921. Cal. Pen. C. Sec. 1307. 6 Am. Jur. 77, Bail and Recognizance, § 71.

94-8711. (12167) Arrest of defendant, in what cases. The court to which the committing magistrate returns the complaint, or in which an indictment, information, or appeal is pending, or to which a judgment on appeal is remitted to be carried into effect, may, by an order entered upon its minutes, direct the arrest of the defendant and his commitment to the officer to whose custody he was committed at the time of giving bail, and his detention until legally discharged, in the following cases:

1. When, by reason of his failure to appear, he has incurred a forfeiture of his bail, or of money deposited instead thereof.
2. When it satisfactorily appears to the court that his bail, or either of them, are dead or insufficient, or have removed from the state.
3. Upon an indictment being found or information filed.

History: En. Sec. 263, p. 230, Cod. Stat. 1871; amd. Sec. 1, p. 45, L. 1873; re-en. Sec. 263, 3d Div. Rev. Stat. 1879; re-en. Sec. 264, 3d Div. Comp. Stat. 1887; amd. Sec. 2420, Pen. C. 1895; re-en. Sec. 9474, Rev. C. 1907; re-en. Sec. 12167, R. C. M. 1921. Cal. Pen. C. Sec. 1310.

Bail \Rightarrow 75; Criminal Law \Rightarrow 263.
8 C.J.S. Bail § 82; 22 C.J.S. Criminal Law § 404.
6 Am. Jur. 112, Bail and Recognizance, §§ 165 et seq.
Arrest of one released on bail. 62 ALR 462.

94-8712. (12168) Contents of order. The order for the recommitment of the defendant must recite generally the facts upon which it is founded, and direct that the defendant be arrested by any sheriff, constable, marshal, or policeman in this state, and committed to the officer in whose custody he was at the time he was admitted to bail, to be detained until legally discharged.

History: En. Sec. 264, p. 230, Cod. Stat. 1871; re-en. Sec. 264, 3d Div. Rev. Stat. 1879; re-en. Sec. 265, 3d Div. Comp. Stat.

1887; amd. Sec. 2421, Pen. C. 1895; re-en. Sec. 9475, Rev. C. 1907; re-en. Sec. 12168, R. C. M. 1921. Cal. Pen. C. Sec. 1311.

94-8713. (12169) Defendant may be arrested in any county. The defendant may be arrested pursuant to the order, upon a certified copy thereof, in any county, in the same manner as upon a warrant of arrest.

History: En. Sec. 265, p. 230, Cod. Stat. 1871; re-en. Sec. 265, 3d Div. Rev. Stat. 1879; re-en. Sec. 266, 3d Div. Comp. Stat.

1887; re-en. Sec. 2422, Pen. C. 1895; re-en. Sec. 9476, Rev. C. 1907; re-en. Sec. 12169, R. C. M. 1921. Cal. Pen. C. Sec. 1312.

94-8714. (12170) If for failure to appear, defendant must be committed. If the order recites, as the ground upon which it is made, the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirement of the order.

History: En. Sec. 266, p. 230, Cod. Stat. 1871; re-en. Sec. 266, 3d Div. Rev. Stat. 1879; re-en. Sec. 267, 3d Div. Comp. Stat.

1887; re-en. Sec. 2423, Pen. C. 1895; re-en. Sec. 9477, Rev. C. 1907; re-en. Sec. 12170, R. C. M. 1921. Cal. Pen. C. Sec. 1313.

94-8715. (12171) If for other cause, he may be admitted to bail. If the order be made for any other cause, and the offense is bailable, the court may fix the amount of bail, and may cause a direction to be inserted in the order that the defendant be admitted to bail in the sum fixed, which must be specified in the order.

History: En. Sec. 267, p. 230, Cod. Stat. 1871; re-en. Sec. 267, 3d Div. Rev. Stat. 1879; re-en. Sec. 268, 3d Div. Comp. Stat.

1887; re-en. Sec. 2424, Pen. C. 1895; re-en. Sec. 9478, Rev. C. 1907; re-en. Sec. 12171, R. C. M. 1921. Cal. Pen. C. Sec. 1314.

94-8716. (12172) Bail in such case, by whom taken. When the defendant is admitted to bail, the bail may be taken by any magistrate in the county having authority in a similar case to admit to bail, upon the holding of the defendant to answer before information filed or by any other magistrate designated by the court.

History: Ap. p. Sec. 268, p. 230, Cod. Stat. 1871; re-en. Sec. 268, 3d Div. Rev. Stat. 1879; re-en. Sec. 269, 3d Div. Comp. Stat. 1887; en. Sec. 2425, Pen. C. 1895; re-en. Sec. 9479, Rev. C. 1907; re-en. Sec.

12172, R. C. M. 1921. Cal. Pen. C. Sec. 1315.

Bail \Rightarrow 47.

8 C.J.S. Bail § 39.

94-8717. (12173) Form of the undertaking. When bail is taken upon the recommitment of the defendant, the undertaking must be substantially in the following form:

"An order having been made on the day of, A. D. nineteen hundred and, by the court (naming it) that A B be admitted to bail in the sum of dollars, in an action pending in that court against him in behalf of the state of Montana, upon an (information, indictment, or appeal, as the case may be), we, C D and E F, of (stating their place of residence and occupation), hereby undertake that the above named A B will appear in that or any other court in which his appearance may be lawfully required, upon the (information, indictment, or appeal, as the case may be) and will at all times render himself amenable to its orders and process, and appear for judgment and surrender himself in execution thereof; or, if he fails to perform either of these conditions, that we will pay to the state of Montana the sum of dollars (insert the sum in which the defendant is admitted to bail)."

History: En. Sec. 2426, Pen. C. 1895; re-en. Sec. 9480, Rev. C. 1907; re-en. Sec. 12173, R. C. M. 1921. Cal. Pen. C. Sec. 1316.

Operation and Effect

In an action on a bail bond in the form prescribed by this section, running to the state, the state and not the county is the

proper party plaintiff, though, under section 94-801-1, the money recovered goes to the county and not to the state. County of Wheatland v. Van et al., 64 M 113, 116, 207 P 1103.

Bail⇒55.

8 C.J.S. Bail §§ 29, 55, 56, 64.

94-8718. (12174) Bail must possess what qualifications and how put in. The bail must possess the qualifications, and must be put in, in all respects, in the manner prescribed in sections 94-8401 to 94-8405.

History: En. Sec. 2427, Pen. C. 1895; re-en. Sec. 9481, Rev. C. 1907; re-en. Sec. 12174, R. C. M. 1921. Cal. Pen. C. Sec. 1317.

Bail⇒60.

8 C.J.S. Bail § 60.

CHAPTER 88

WHO MAY BE WITNESSES IN CRIMINAL ACTIONS

Section 94-8801. Who are competent witnesses.

94-8802. Competency of husband and wife as witnesses.

94-8803. When the defendant is not a competent witness and when he may testify.

94-8804. Testimony of several persons concerned in commission of offense—privilege and immunity.

94-8801. (12175) Who are competent witnesses. The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this code.

History: En. Sec. 2440, Pen. C. 1895; re-en. Sec. 9482, Rev. C. 1907; re-en. Sec. 12175, R. C. M. 1921. Cal. Pen. C. Sec. 1321.

a criminal case. State v. Cadotte, 17 M 315, 316, 42 P 857.

Operation and Effect

A boy fifteen years of age, called as a witness, who answers that he understood what he had done when he took the oath, that he knows the difference between truth and falsehood, that the truth was that which was so, and not that which was not so, and that he knew that if he did not tell the truth he would be punished, sufficiently qualifies himself to testify in

Witnesses⇒35.

70 C.J. Witnesses § 108 et seq.

58 Am. Jur., Witnesses, §§ 102-213.

Promise of immunity or leniency as affecting one's competence as witness in criminal case. 120 ALR 751.

Mental condition as affecting competency of witness. 148 ALR 1140.

Judge as a witness in a cause on trial before him. 157 ALR 315.

94-8802. (12176) Competency of husband and wife as witnesses. Except with the consent of both, or in cases of criminal violence upon one by the other, or in case of abandonment, or neglect of children by either party, or of abandonment or neglect of the wife by the husband, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties.

History: En. Sec. 2441, Pen. C. 1895; re-en. Sec. 9483, Rev. C. 1907; amd. Sec. 1, Ch. 111, L. 1915; re-en. Sec. 12176, R. C. M. 1921. Cal. Pen. C. Sec. 1322.

Operation and Effect

Under this section, as amended, a wife was competent to testify in a prosecution against her husband for attempted murder. *State v. Rains*, 53 M 424, 164 P 540.

Witnesses—52 (7), 61 (2), 62.

70 C.J. Witnesses § 145 et seq.

58 Am. Jur., Witnesses, §§ 175 et seq.

Polygamy by one spouse as crime against other spouse within statute as to com-

petency as witness against other. 4 ALR 1072.

Competency or privilege of one spouse as a witness in a prosecution against other for an offense committed before marriage. 76 ALR 1088.

Killing or assaulting third person as offense by one spouse against the other within exception to rule of incompetency of husband or wife. 82 ALR 644.

Change in common law disqualifying spouse as witness. 93 ALR 1144.

Husband or wife as competent witness to transaction with deceased person with reference to disposal of policy. 122 ALR 1302.

94-8803. (12177) When the defendant is not a competent witness and when he may testify. A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but he may be sworn, and may testify in his own behalf, and the jury in judging of his credibility and the weight to be given to his testimony, may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he is accused. If the defendant does not claim the right to be sworn, or does not testify, it must not be used to his prejudice, and the attorney prosecuting must not comment to the court or jury on the same.

History: En. Sec. 15, p. 271, Cod. Stat. 1871; re-en. Sec. 15, 4th Div. Rev. Stat. 1879; re-en. Sec. 15, 4th Div. Comp. Stat. 1887; amd. Sec. 2442, Pen. C. 1895; re-en. Sec. 9484, Rev. C. 1907; re-en. Sec. 12177, R. C. M. 1921. Cal. Pen. C. Sec. 1323.

Defendant Who Testifies in Own Behalf Waives His Right

Where defendant in a criminal prosecution takes the stand as a witness in his own behalf, and testifies that he did not commit the crime imputed to him, he waives his constitutional privilege, and cannot refuse to testify to any facts which would be competent evidence in the case, if proved by other witnesses. *State v. Smith*, 57 M 349, 188 P 644.

Instruction on Section

An instruction, submitted to the jury in a criminal case, embodying the provisions of this section, was not open to the objection that it practically deprived him of the presumption of innocence which attends him until his guilt is established beyond a reasonable doubt. *State v. Farnham*, 35 M 375, 379, 89 P 728.

While it is the general rule that a court ought not in its instructions single out a particular witness and direct the attention of the jury to his testimony, this section makes an exception to the rule, and the court may properly instruct that the jury, in judging the credibility of one on trial for a crime and the weight to be given to his testimony, may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he stands charged. *State v. De Lea*, 36 M 531, 541, 93 P 814.

Where defendant did not testify in his own behalf, an instruction in the words of this section that if defendant does testify, the jury, in judging of the credibility and weight of his testimony, may take into consideration the fact that he is the defendant and the nature and enormity of the crime, though unnecessary, was harmless. *State v. Stevens*, 60 M 390, 405, 199 P 256; *State v. Kessler*, 74 M 166, 167, 239 P 1000.

"Must" for "May" in Instruction Not Erroneous

An instruction giving this section, which uses the word "must" in place of the stat-

utory word "may," is not erroneous. *State v. Dotson*, 26 M 305, 311, 67 P 938.

Not Applicable to Disbarment Proceedings

A disbarment proceeding is not a criminal prosecution, but a special proceeding of a civil nature, and the court is not therefore precluded under this section from taking into consideration the accused's failure to be sworn in his own behalf. In *re Welcome*, 23 M 450, 468, 59 P 445.

References

Cited or applied as section 9484, Revised Codes, in *State v. Sparks*, 40 M 82, 88, 105 P 87; *State v. Inich*, 55 M 1, 14, 173 P 230; *State v. Allison*, 116 M 352, 356, 153 P 2d 141.

Criminal Law ⚡721 (1); Witnesses ⚡88, 300.

23 C.J.S. Criminal Law § 1098; 70 C.J. Witnesses §§ 260 et seq., 888.

94-8804. (12178) Testimony of several persons concerned in commission of offense—privilege and immunity. When two or more persons are jointly, or otherwise, concerned in the commission of an offense, any one of such persons may testify for or against the other in relation to the offense committed, but the testimony of such witness must not be used against him in any criminal action or proceeding.

History: En. Sec. 14, p. 271, Cod. Stat. 1871; re-en. Sec. 14, 4th Div. Rev. Stat. 1879; re-en. Sec. 14, 4th Div. Comp. Stat. 1887; amd. Sec. 2443, Pen. C. 1895; re-en. Sec. 9485, Rev. C. 1907; re-en. Sec. 12178, R. C. M. 1921.

Operation and Effect

An accomplice is a competent witness against an accused, although his testimony

was obtained by threats or inducements. Such facts bear upon his credibility only, and not upon his competency, and his testimony is not subject to the rules governing admissions by a prisoner accused and on trial. Very great latitude should be allowed in the cross-examination of an accomplice. *State v. Geddes*, 22 M 68, 89, 55 P 919.

CHAPTER 89

COMPELLING ATTENDANCE OF WITNESSES—SUBPOENAS

- Section 94-8901. Subpoena defined and who may issue.
 94-8902. Form of subpoena.
 94-8903. Subpoena, by whom and how served.
 94-8904. Criminal actions not more than six to be subpoenaed without order of court.
 94-8905. Expenses of witness from without the county or poor.
 94-8906. Attendance of witness residing or served out of the county.
 94-8907. Disobedience to subpoena, etc.
 94-8908. Failure to appear, undertaking forfeited.
 94-8909. Temporary removal of imprisoned witnesses.

94-8901. (12179) Subpoena defined and who may issue. The process by which the attendance of a witness before a court or magistrate is required is a subpoena. It may be signed and issued by—

1. A magistrate before whom a complaint is laid, for witnesses in the state, either on behalf of the state or of the defendant;
2. The county attorney, for witnesses in the state, in support of the prosecution, or for such other witnesses as the grand jury, upon an investigation pending before them, may direct;
3. The county attorney, for witnesses in the state, in support of an indictment or information, to appear before the court in which it is to be tried;
4. The clerk of the court in which an indictment or information is to be tried; and he must, at any time, upon application of the defendant, and

without charge, issue as many blank subpoenas, subscribed by him as clerk, for witnesses in the state, as the defendant may require, under the direction of the court or judge.

History: En. Sec. 2460, Pen. C. 1895; re-en. Sec. 9486, Rev. C. 1907; re-en. Sec. 12179, R. C. M. 1921. Cal. Pen. C. Sec. 1326.

References

Cited or applied as section 9486, Revised Codes, in State ex rel. Wolfe v. District Court et al., 52 M 556, 160 P 346.

Cross-References

Fees of witnesses, sec. 25-404.
Mileage of witnesses, sec. 59-801.

Witnesses—10.

70 C.J. Witnesses § 25.

58 Am. Jur., Witnesses, §§ 13 et seq.

94-8902. (12180) Form of subpoena. A subpoena authorized by the last section must be substantially in the following form:

“The State of Montana to A B:

“You are commanded to appear before C D, a justice of the peace of _____ township, in _____ county (or as the case may be) at (naming the place), on (stating the day and hour), as a witness in a criminal action prosecuted by the State of Montana against E F.

“Given under my hand this _____ day of _____, A. D. nineteen hundred and _____, G H, justice of the peace” (or “J K, county attorney,” or “by order of the court, L M, clerk”; or as the case may be).

If books, papers, or documents are required, a direction to the following effect must be contained in the subpoena: “And you are required, also, to bring with you the following (describing intelligibly the books, papers, or documents required).”

History: En. Sec. 2461, Pen. C. 1895; re-en. Sec. 9487, Rev. C. 1907; re-en. Sec. 12180, R. C. M. 1921. Cal. Pen. C. Sec. 1327.

Witnesses—11.

70 C.J. Witnesses § 24.

94-8903. (12181) Subpoena, by whom and how served. A subpoena may be served by any person, but a peace officer must serve in his county any subpoena delivered to him for service, either on the part of the state or of the defendant, and must without delay, make a written return of the service, subscribed by him, stating the time and place of service. The service is made by showing the original to the witness personally, and informing him of its contents.

History: En. Sec. 2462, Pen. C. 1895; re-en. Sec. 9488, Rev. C. 1907; re-en. Sec. 12181, R. C. M. 1921. Cal. Pen. C. Sec. 1328.

Witnesses—13.

70 C.J. Witnesses § 26.

94-8904. (4945) Criminal actions not more than six to be subpoenaed without order of court. In criminal actions in a court of record, the clerk of the court must not issue a subpoena on behalf of the state or defendant for more than six witnesses, except upon the order of the court or judge, and such order may be made upon proper showing by affidavit or otherwise.

History: En. Sec. 4656, Pol. C. 1895; re-en. Sec. 3190, Rev. C. 1907; re-en. Sec. 4945, R. C. M. 1921.

for additional witnesses, to disclose the materiality of their testimony. State v. O'Brien, 18 M 1, 12, 43 P 1091, 44 P 399.

Operation and Effect

It is proper for the court to require the defendant, upon request for a subpoena

Witnesses—8.

70 C.J. Witnesses § 22.

94-8905. (12182) Expenses of witness from without the county or poor.

When a person attends before a magistrate, grand jury, or court, as a witness in a criminal case, upon a subpoena or in pursuance of an undertaking, and it appears that he has come from a place outside of the county, or that he is poor and unable to pay the expenses of such attendance, the court, at its discretion, if the attendance of the witness be upon a trial, by an order upon its minutes, or in any other case, the judge, at his discretion, by a written order, may direct the clerk of the court to draw his warrant upon the county treasurer in favor of such witness for a reasonable sum, to be specified in the order, for the necessary expenses of the witness.

History: En. Sec. 2463, Pen. C. 1895; Witnesses 14.
 re-en. Sec. 9489, Rev. C. 1907; re-en. Sec. 70 C.J. Witnesses § 26.
 12182, R. C. M. 1921. Cal. Pen. C. Sec. 1329.

94-8906. (12183) Attendance of witness residing or served out of the county. No person is obliged to attend as a witness before a court or magistrate out of the county where the witness resides, or is served with the subpoena, unless the judge of the court in which the offense is triable, or a justice of the supreme court, or a judge of the district court, upon an affidavit of the county attorney or prosecutor, or of the defendant, or his counsel, stating that he believes the evidence of the witness is material, and his attendance at the examination, or trial, necessary, shall indorse on the subpoena an order for the attendance of the witness.

History: En. Sec. 2464, Pen. C. 1895; Witnesses 6.
 re-en. Sec. 9490, Rev. C. 1907; re-en. Sec. 70 C.J. Witnesses § 17 et seq.
 12183, R. C. M. 1921. Cal. Pen. C. Sec. 1330.

94-8907. (12184) Disobedience to subpoena, etc. Disobedience to a subpoena, or a refusal to be sworn or to testify as a witness, may be punished by the court or magistrate as a contempt. A witness disobeying a subpoena issued on the part of the defendant, unless he show good cause for his non-attendance, is liable to the defendant in the sum of one hundred dollars, which may be recovered in a civil action.

History: En. Sec. 2465, Pen. C. 1895; to produce books and records before grand jury. 27 ALR 145.
 re-en. Sec. 9491, Rev. C. 1907; re-en. Sec. Duration of imprisonment for refusal to answer question before grand jury. 28 ALR 1364.
 12184, R. C. M. 1921. Cal. Pen. C. Sec. 1331.

Witnesses 21, 22.

70 C.J. Witnesses § 44.

Privilege of corporate officers to refuse examination as ground for new trial or reversal. 57 ALR 70.

94-8908. (12185) Failure to appear, undertaking forfeited. When a witness has entered into an undertaking to appear, upon his failure to do so the undertaking is forfeited in the same manner as undertakings of bail.

History: En. Sec. 2466, Pen. C. 1895; Witnesses 19.
 re-en. Sec. 9492, Rev. C. 1907; re-en. Sec. 70 C.J. Witnesses § 59 et seq.
 12185, R. C. M. 1921. Cal. Pen. C. Sec. 1332.

94-8909. (12186) Temporary removal of imprisoned witnesses. When the testimony of a material witness for the state is required in a criminal action, before a court of record of this state, and such witness is a prisoner in the state prison, or in a county jail, an order for his temporary removal from such prison or jail, and for his production before such court, may be made by the court in which the action is pending, or by the judge thereof;

but in case the prison or jail is out of the county in which the application is made, such order shall only be made upon affidavit of the county attorney, or other person, on behalf of the state, showing that the testimony is material and necessary; and even then the granting of the order shall be in the discretion of the court or judge. The order must be executed by the sheriff of the county in which it is made, whose duty it shall be to bring the prisoner before the proper court, to safely keep him, and when he is no longer required as a witness, to return him to the prison or jail whence he was taken; the expense of executing such order shall be paid by the county in which the order shall be made.

History: En. Sec. 2467, Pen. C. 1895; re-en. Sec. 9493, Rev. C. 1907; re-en. Sec. 12186, R. C. M. 1921. Cal. Pen. C. Sec. 1333.

Operation and Effect

Where state court desires that prisoner be produced for use as witness, and cus-

todian is not sheriff of county in which court requiring prisoner sits, writ of habeas corpus must be employed, notwithstanding this section. United States v. Schultz, 37 F. 2d 619.

Witnesses⇒4.

70 C.J. Witnesses § 12 et seq.

CHAPTER 90

WITNESSES FROM WITHOUT STATE—HOW SECURED IN CRIMINAL PROCEEDINGS

- Section 94-9001. "Witness" and "state" defined.
 94-9002. Summoning witness in this state to testify in another state.
 94-9003. Witness from another state summoned to testify in this state.
 94-9004. Exemption from arrest and service of process.
 94-9005. Uniformity of interpretation.
 94-9006. Short title.
 94-9007. Inconsistent laws repealed.

94-9001. "Witness" and "state" defined. Witness—as used in this act shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding. The word state shall include any territory of the United States and District of Columbia.

History: En. Sec. 1, Ch. 188, L. 1937.

NOTE.—Uniform State Law. Sections 94-9001 through 94-9007 constitute the "Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings" approved by the National Conference of Commissioners on Uniform State Laws in 1936 and adopted in the states of Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Louisiana, Maine, Mary-

land, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming and also Puerto Rico.

Witnesses⇒6.

70 C.J. Witnesses § 18.

94-9002. Summoning witness in this state to testify in another state.

(1) If a judge of a court of record in any state, which, by its laws has made provision for commanding persons within that state to attend and testify in this state, certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days,

upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

(2) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution, or a grand jury investigation, in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(3) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

(4) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten (10c) cents a mile for each mile and five dollars (\$5.00) for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

History: En. Sec. 2, Ch. 188, L. 1937.

94-9003. Witness from another state summoned to testify in this state.

(1) If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(2) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, such judge may direct that such witness be forthwith brought before him; and the judge being satisfied of the desirability of such custody and delivery, for which determination said certificate shall be prima facie

proof, may order that said witness be forthwith taken into custody and delivered to an officer of this state, which order shall be sufficient authority to such officer to take such witness into custody and hold him unless and until he may be released by bail, recognizance, or order of the judge issuing the certificate.

(3) If the witness is summoned to attend and testify in this state, he shall be tendered the sum of ten cents (10c) a mile for each mile and five dollars (\$5.00) for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

History: En. Sec. 3, Ch. 188, L. 1937.

94-9004. Exemption from arrest and service of process. If a person comes into this state in obedience to a summons directing him to attend and testify in this state, he shall not, while in this state pursuant to such summons or order, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

If a person passes through this state while going to another state in obedience to a summons or order to attend and testify in that state or while returning therefrom he shall not, while so passing through this state, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons or order.

History: En. Sec. 4, Ch. 188, L. 1937.

Arrest—9, 60; Process—120.

6 C.J.S. Arrest §§ 3, 29.

4 Am. Jur. 68, Arrest, §§ 101, 102; 42 Am. Jur. 123, Process, § 142.

Waiver of privilege against or nonliability to arrest in civil action. 8 ALR 754.

Nonresident requested or required to remain in state pending investigation of accident. 59 ALR 51.

Public policy as ground for exemption of parties and witnesses from service of civil process. 85 ALR 1341.

94-9005. Uniformity of interpretation. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

History: En. Sec. 5, Ch. 188, L. 1937.

94-9006. Short title. This act may be cited as "Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases".

History: En. Sec. 6, Ch. 188, L. 1937.

94-9007. Inconsistent laws repealed. All acts or parts of acts inconsistent with this act are hereby repealed.

History: En. Sec. 7, Ch. 188, L. 1937.

CHAPTER 91

EXAMINATION OF WITNESSES CONDITIONALLY

Section 94-9101.	State or defendant may examine witness conditionally.
94-9102.	Depositions of material witnesses.
94-9103.	Affidavit for deposition.
94-9104.	Notice of application.
94-9105.	Order to take deposition.
94-9106.	Duty of magistrate to take deposition.
94-9107.	Rights of defendant.
94-9108.	Compelling attendance of witness.
94-9109.	Reduction of testimony to writing.
94-9110.	Filing deposition.
94-9111.	When deposition may be read.
94-9112.	Deposition of witness in jail.

94-9101. (12187) State or defendant may examine witness conditionally.

When a defendant has been held to answer a charge for a public offense, he, and the state, may, in all cases, either before or after an information has been filed or after an indictment has been found, have witnesses examined conditionally, on his or its behalf, as prescribed in this chapter, and not otherwise.

History: En. Sec. 2480, Pen. C. 1895; amd. Sec. 1, Ch. 109, L. 1907; Sec. 9494, Rev. C. 1907; re-en. Sec. 12187, R. C. M. 1921. Cal. Pen. C. Sec. 1335.

Operation and Effect

There is not any limitation as to the time when depositions in criminal cases may be taken, and this and the following

section at least imply that they may be taken at any time after the defendant has been held to answer the charge, even before an information has been filed against him. *State v. Vanella*, 40 M 326, 337, 106 P 364.

Depositions—6.

26 C.J.S. Depositions § 16.

94-9102. (12188) Depositions of material witnesses. When a material witness for the defendant or the state cannot give security for his appearance at the trial, the defendant or the state may apply to the district court of the county or district in which the offense is alleged to have been committed for an order to take his deposition.

History: En. Sec. 2481, Pen. C. 1895; amd. Sec. 1, Ch. 109, L. 1907; Sec. 9495, Rev. C. 1907; re-en. Sec. 12188, R. C. M. 1921. Cal. Pen. C. Sec. 1336.

References

Cited or applied as section 9495, Revised Codes, in *State v. Vanella*, 40 M 326, 337, 106 P 364.

Depositions—11.

26 C.J.S. Depositions §§ 5, 6.

See generally, 16 Am. Jur. 695, Depositions.

Making copies of records or writings part of deposition. 59 ALR 530.

Constitutionality of statute permitting state to take or use in evidence depositions in criminal case. 90 ALR 377.

Submitting to jurisdiction by seeking relief as to deposition. 111 ALR 933.

94-9103. (12189) Affidavit for deposition. The application must be made upon affidavit stating—

1. The nature of the offense charged;
2. The state of the proceedings in the action;
3. The name and residence of the witness, and that his testimony is material to the defense, or prosecution of the action;
4. That the witness cannot give security for his appearance at the time of the trial.

History: En. Sec. 2482, Pen. C. 1895; amd. Sec. 1, Ch. 109, L. 1907; Sec. 9496, Rev. C. 1907; re-en. Sec. 12189, R. C. M. 1921. Cal. Pen. C. Sec. 1337.

Depositions↔36.
26 C.J.S. Depositions §§ 30, 34.
16 Am. Jur. 711, Depositions, §§ 29 et seq.

94-9104. (12190) Notice of application. The application must be made to the court or judge thereof upon not less than three days' notice to the opposite party.

History: En. Sec. 2483, Pen. C. 1895; amd. Sec. 1, Ch. 109, L. 1907; Sec. 9497, Rev. C. 1907; re-en. Sec. 12190, R. C. M. 1921. Cal. Pen. C. Sec. 1338.

Depositions↔35.
26 C.J.S. Depositions §§ 35, 40.
16 Am. Jur. 714, Depositions, §§ 38 et seq.

94-9105. (12191) Order to take deposition. If the court or judge thereof is satisfied that the examination of the witness is necessary, an order must be made that his deposition shall be taken, at a specified time and place, and before a magistrate designated therein, and that a copy of the order be served on the opposite party, within a time specified before that fixed for the examination.

History: En. Sec. 2484, Pen. C. 1895; amd. Sec. 1, Ch. 109, L. 1907; Sec. 9498, Rev. C. 1907; re-en. Sec. 12191, R. C. M. 1921. Cal. Pen. C. Sec. 1339.

Depositions↔38.
26 C.J.S. Depositions §§ 30, 41.

94-9106. (12192) Duty of magistrate to take deposition. On proof being furnished to such magistrate by affidavit or otherwise that a copy of the order has been served upon the opposite party, the examination must proceed.

History: En. Sec. 2485, Pen. C. 1895; re-en. Sec. 9499, Rev. C. 1907; re-en. Sec. 12192, R. C. M. 1921.

Depositions↔64 (1).
26 C.J.S. Depositions § 67.

94-9107. (12193) Rights of defendant. The defendant has the right to be present in person and with counsel at such examination, and, if the defendant is in custody, the officer in whose custody he is must be informed of the time and place of such examination, and must take the defendant thereto, and keep him in the presence and hearing of the witness during the examination. The defendant, if in custody, shall be brought before the judge or the court to whom the application is made to take the deposition, and be present at the hearing. If it appears to the judge or court that the defendant is without an attorney and unable to employ one, the court shall appoint an attorney to appear for him at the hearing and upon the trial of the case. It shall be the duty of the attorney so appointed to be present at such hearing.

History: Ap. p. Sec. 2486, Pen. C. 1895; en. Sec. 1, Ch. 109, L. 1907; Sec. 9500, Rev. C. 1907; re-en. Sec. 12193, R. C. M. 1921. Cal. Pen. C. Sec. 1340.

Depositions↔56 (5), 60, 61.
26 C.J.S. Depositions §§ 52, 53, 63.

94-9108. (12194) Compelling attendance of witness. The attendance of the witness may be enforced by a subpoena, issued by the magistrate before whom the examination is to be taken, or by the court or judge making the order.

History: En. Sec. 2487, Pen. C. 1895; Depositions↔57.
 amd. Sec. 1, Ch. 109, L. 1907; Sec. 9501, 26 C.J.S. Depositions § 61.
 Rev. C. 1907; re-en. Sec. 12194, R. C. M.
 1921. Cal. Pen. C. Sec. 1342.

94-9109. (12195) Reduction of testimony to writing. The testimony given by the witness must be reduced to writing, and authenticated in the same manner as a deposition in a civil action.

History: En. Sec. 2488, Pen. C. 1895; Depositions↔67.
 amd. Sec. 1, Ch. 109, L. 1907; Sec. 9502, 26 C.J.S. Depositions § 69.
 Rev. C. 1907; re-en. Sec. 12195, R. C. M.
 1921. Cal. Pen. C. Sec. 1343.

94-9110. (12196) Filing deposition. The deposition must, by the magistrate, be sealed up and transmitted to the clerk of the court making the order, there to be filed and held until the action shall come on for trial.

History: En. Sec. 2489, Pen. C. 1895; Depositions↔79.
 amd. Sec. 1, Ch. 109, L. 1907; Sec. 9503, 26 C.J.S. Depositions § 80.
 Rev. C. 1907; re-en. Sec. 12196, R. C. M.
 1921. Cal. Pen. C. Sec. 1344.

94-9111. (12197) When deposition may be read. The deposition, or a certified copy thereof, may be read in evidence in any court in this state by either party on the trial, upon it appearing that the witness is dead or is absent from the state, and the same objections may be made to the deposition at the trial as if the witness had been examined in court.

History: En. Sec. 2490, Pen. C. 1895; Codes, in State v. Vanella, 40 M 326, 332,
 amd. Sec. 1, Ch. 109, L. 1907; Sec. 9504, 106 P 364.
 Rev. C. 1907; re-en. Sec. 12197, R. C. M.
 1921. Cal. Pen. C. Sec. 1345.

References

Cited or applied as section 9504, Revised

Depositions↔88, 90.
 26 C.J.S. Depositions §§ 89, 92.

94-9112. (12198) Deposition of witness in jail. When a material witness for a defendant, under a criminal charge, is a prisoner in the state prison, or in a county jail of a county other than that in which the defendant is to be tried, his deposition may be taken, on behalf of the defendant, in the manner provided for in the case of a witness who cannot give security for his appearance at the trial, and the provisions of sections 94-9101 to 94-9111, so far as applicable, govern the application for and in the taking and use of such deposition. Such deposition may be taken before any magistrate or notary public of the county of which the jail or prison is situate; or in case the witness is confined in the state prison, and the defendant is unable to pay for taking the deposition, it may be taken before the warden of the state prison, whose duty it shall be to act without compensation. Every officer, before whom testimony shall be taken under this chapter, shall have authority to administer, and shall administer, an oath to the witness that his testimony shall be the truth, the whole truth and nothing but the truth.

History: En. Sec. 2491, Pen. C. 1895; Depositions↔17.
 amd. Sec. 1, Ch. 109, L. 1907; Sec. 9505, 26 C.J.S. Depositions § 8.
 Rev. C. 1907; re-en. Sec. 12198, R. C. M.
 1921. Cal. Pen. C. Sec. 1346.

CHAPTER 92

EXAMINATION OF WITNESSES ON COMMISSION

- Section 94-9201. Examination of witness residing out of the state.
 94-9202. When defendant may apply for an order to examine.
 94-9203. Commission defined.
 94-9204. Application made on affidavit.
 94-9205. Application, to whom made.
 94-9206. Order for commission, when granted, stay of proceedings.
 94-9207. Interrogatories, how settled and allowed.
 94-9208. Direction as to the return of the commission.
 94-9209. Commission, how executed.
 94-9210. Returned commission, delivery to an agent.
 94-9211. Same.
 94-9212. When and how filed.
 94-9213. Commission and return, open for inspection—copies, etc.
 94-9214. Depositions to be read in evidence—objections.

94-9201. (12199) Examination of witness residing out of the state. When an issue of fact is joined upon an indictment or information, the defendant may have any material witness residing out of the state, examined in his behalf, as prescribed in this chapter, and not otherwise.

History: En. Sec. 2500, Pen. C. 1895; Depositions 212.
 re-en. Sec. 9506, Rev. C. 1907; re-en. Sec. 26 C.J.S. Depositions §§ 6, 10.
 12199, R. C. M. 1921. Cal. Pen. C. Sec. 16 Am. Jur. 708, Depositions, §§ 22 et
 1349. seq.

94-9202. (12200) When defendant may apply for an order to examine. When a material witness for the defendant resides out of the state, the defendant may apply for an order that the witness be examined on a commission.

History: En. Sec. 2501, Pen. C. 1895; 12200, R. C. M. 1921. Cal. Pen. C. Sec.
 re-en. Sec. 9507, Rev. C. 1907; re-en. Sec. 1350.

94-9203. (12201) Commission defined. A commission is a process issued under seal of the court and the signature of the clerk, directed to some person designated as commissioner, authorizing him to examine the witness upon oath or interrogatories annexed thereto, to take and certify the deposition of the witness, and to return it according to the directions given with the commission.

History: En. Sec. 2502, Pen. C. 1895; Depositions 224.
 re-en. Sec. 9508, Rev. C. 1907; re-en. Sec. 26 C.J.S. Depositions § 42.
 12201, R. C. M. 1921. Cal. Pen. C. Sec. 1351.

94-9204. (12202) Application made on affidavit. The application must be made upon affidavit stating—

1. The nature of the offense charged;
2. The state of the proceedings in the action, and that an issue of fact has been joined therein;
3. The name of the witness, and that his testimony is material to the defense of the action;
4. That the witness resides out of the state.

History: En. Sec. 2503, Pen. C. 1895; Depositions 236.
 re-en. Sec. 9509, Rev. C. 1907; re-en. Sec. 26 C.J.S. Depositions §§ 30, 34.
 12202, R. C. M. 1921. Cal. Pen. C. Sec. 1352.

94-9205. (12203) Application, to whom made. The application may be made to the court or a judge thereof, and must be upon three days' notice to the county attorney.

History: En. Sec. 2504, Pen. C. 1895;
re-en. Sec. 9510, Rev. C. 1907; re-en. Sec.
12203, R. C. M. 1921. Cal. Pen. C. Sec.
1353.

Depositions⇒35.
26 C.J.S. Depositions §§ 35, 40.

94-9206. (12204) Order for commission, when granted, stay of proceedings. If the court to whom the application is made is satisfied of the truth of the facts stated, and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony; and the court may insert in the order a direction that the trial be stayed for a specified time, reasonably sufficient for the execution and return of the commission.

History: En. Sec. 2505, Pen. C. 1895;
re-en. Sec. 9511, Rev. C. 1907; re-en. Sec.
12204, R. C. M. 1921. Cal. Pen. C. Sec.
1354.

Depositions⇒38.
26 C.J.S. Depositions §§ 30, 41.

94-9207. (12205) Interrogatories, how settled and allowed. When the commission is ordered, the defendant must serve upon the county attorney, without delay, a copy of the interrogatories to be annexed thereto, with two days' notice of the time at which they will be presented to the court or judge. The county attorney may in like manner serve upon the defendant or his counsel cross-interrogatories, to be annexed to the commission, with the like notice. In the interrogatories either party may insert any questions pertinent to the issue. When the interrogatories and cross-interrogatories are presented to the court or judge, according to the notice given, the court or judge must modify the questions so as to conform them to the rules of evidence, and must indorse upon them his allowance and annex them to the commission.

History: En. Sec. 2506, Pen. C. 1895;
re-en. Sec. 9512, Rev. C. 1907; re-en. Sec.
12205, R. C. M. 1921. Cal. Pen. C. Sec.
1355.

Depositions⇒46.
26 C.J.S. Depositions §§ 49, 50.

94-9208. (12206) Direction as to the return of the commission. Unless the parties otherwise consent, by an indorsement upon the commission, the court or judge must indorse thereon a direction as to the manner in which it must be returned, and may, in his discretion, direct that it be returned by mail or otherwise, addressed to the clerk of the court in which the action is pending, designating his name and the place where his office is kept.

History: En. Sec. 2507, Pen. C. 1895;
re-en. Sec. 9513, Rev. C. 1907; re-en. Sec.
12206, R. C. M. 1921. Cal. Pen. C. Sec.
1356.

Depositions⇒73.
26 C.J.S. Depositions §§ 73, 74.

94-9209. (12207) Commission, how executed. The commissioner, unless otherwise specially directed, may execute the commission as follows:

1. He must publicly administer an oath to the witness that his answers given to the interrogatories shall be the truth, the whole truth, and nothing but the truth.

2. He must cause the examination of the witness to be reduced to writing, and subscribed by him.

3. He must write the answers of the witness as near as possible in the language in which he gives them, and read to him each answer as it is taken down, and correct or add to it until it conforms to what he declares is the truth.

4. If the witness decline answering a question, that fact, with the reason assigned by him for declining, must be stated.

5. If any papers or documents are produced before him and proved by the witness, they, or copies of them, must be annexed to the deposition subscribed by the witness and certified by the commissioner.

6. The commissioner must subscribe his name to each sheet of the deposition, and annex the deposition, with the papers and documents proved by the witness, or copies thereof, to the commission, and must close it up under seal, and address it as directed by the indorsement thereon.

7. If there be a direction on the commission to return it by mail the commissioner must immediately deposit it in the nearest postoffice. If any other direction be made by the written consent of the parties, or by the court or judge, on the commission, as to its return, the commissioner must comply with the direction. A copy of this section must be annexed to the commission.

History: En. Sec. 2508, Pen. C. 1895; Depositions 60.
re-en. Sec. 9514, Rev. C. 1907; re-en. Sec. 26 C.J.S. Depositions § 58.
12207, R. C. M. 1921. Cal. Pen. C. Sec. 1357.

94-9210. (12208) Returned commission, delivery to an agent. If the commission and return be delivered by the commissioner to an agent, he must deliver the same to the clerk to whom it is directed, or to the judge of the court in which the action is pending, by whom it may be received and opened, upon the agent making affidavit that he received it from the hands of the commissioner, and that it has not been opened or altered since he received it.

History: En. Sec. 2509, Pen. C. 1895; Depositions 78.
re-en. Sec. 9515, Rev. C. 1907; re-en. Sec. 26 C.J.S. Depositions § 79.
12208, R. C. M. 1921. Cal. Pen. C. Sec. 1358.

94-9211. (12209) Same. If the agent is dead, or from sickness or other casualty unable personally to deliver the commission and return, as prescribed in the last section, it may be received by the clerk or judge from any other person, upon his making affidavit that he received it from the agent, that the agent is dead, or from sickness or other casualty unable to deliver it; that it has not been opened or altered since the person making the affidavit received it; and that he believes it has not been opened or altered since it came from the hands of the commissioner.

History: En. Sec. 2510, Pen. C. 1895; 12209, R. C. M. 1921. Cal. Pen. C. Sec. 1359.
re-en. Sec. 9516, Rev. C. 1907; re-en. Sec.

94-9212. (12210) When and how filed. The clerk or judge receiving and opening the commission and return must immediately file it, with the

affidavit mentioned in the last two sections, in the office of the clerk of the court in which the indictment is pending or information filed. If the commission and return is transmitted by mail, the clerk to whom it is addressed must receive it from the postoffice, and open and file it in his office, where it must remain, unless otherwise directed by the court or judge.

History: En. Sec. 2511, Pen. C. 1895; Depositions 79.
re-en. Sec. 9517, Rev. C. 1907; re-en. Sec. 26 C.J.S. Depositions § 80.
12210, R. C. M. 1921. Cal. Pen. C. Sec.
1360.

94-9213. (12211) Commission and return, open for inspection—copies, etc. The commission and return must at all times be open to the inspection of the parties, who must be furnished by the clerk with copies of the same or any part thereof, on payment of his fees.

History: En. Sec. 2512, Pen. C. 1895; Depositions 80.
re-en. Sec. 9518, Rev. C. 1907; re-en. Sec. 26 C.J.S. Depositions §§ 81, 82.
12211, R. C. M. 1921. Cal. Pen. C. Sec.
1361.

94-9214. (12212) Depositions to be read in evidence—objections. The depositions taken under the commission may be read in evidence by either party on the trial, upon it being shown that the witness is unable to attend from any cause whatever; and the same objections may be taken to a question in the interrogatories or to an answer in the deposition, as if the witness had been examined orally in court.

History: En. Sec. 2513, Pen. C. 1895; Depositions 88.
re-en. Sec. 9519, Rev. C. 1907; re-en. Sec. 26 C.J.S. Depositions § 89.
12212, R. C. M. 1921. Cal. Pen. C. Sec.
1362.

CHAPTER 93

PROCEEDINGS ON INQUIRY AS TO SANITY OF A DEFENDANT

- Section 94-9301. Insane person cannot be tried or punished.
94-9302. Doubts as to sanity of the defendant, how determined—stay of proceedings on.
94-9303. Trial of the question of insanity—charge of court.
94-9304. Verdict of the jury as to sanity and proceedings thereon.
94-9305. If defendant is committed, it exonerates his bail, etc.
94-9306. Defendant detained in asylum until he becomes sane.
94-9307. Expense of sending, etc., defendant to asylum.

94-9301. (12213) Insane person cannot be tried or punished. A person cannot be tried, adjudged to punishment, or punished for a public offense while he is insane.

History: Earlier acts, see Secs. 463-467, pp. 259, 260, Cod. Stat. 1871; re-en. Secs. 463-467, 3d Div. Rev. Stat. 1879; re-en. Secs. 465-469, 3d Div. Comp. Stat. 1887.

This section en. Sec. 2520, Pen. C. 1895; re-en. Sec. 9520, Rev. C. 1907; re-en. Sec. 12213, R. C. M. 1921. Cal. Pen. C. Sec. 1367.

References

Cited or applied as section 2520, Penal Code, in State ex rel. Dempsey v. District Court, 24 M 566, 567, 63 P 389; State v. Vetter, 77 M 66, 71, 249 P 666; State v. Narich, 92 M 17, 19, 9 P 2d 477.

Criminal Law 625, 981 (1).
23 C.J.S. Criminal Law § 940; 24 C.J.S. Criminal Law §§ 1569, 1619.

94-9302. (12214) Doubts as to sanity of the defendant, how determined—stay of proceedings on. When an action is called for trial, or at any time

during the trial, or when the defendant is brought up for judgment on conviction, if a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury, which must be drawn and selected as in other cases; and the trial or the pronouncing of the judgment must be suspended until the question is determined by their verdict, and the trial jury may be discharged or retained, according to the discretion of the court, during the pendency of the issue of insanity.

History: En. Sec. 2521, Pen. C. 1895; re-en. Sec. 9521, Rev. C. 1907; re-en. Sec. 12214, R. C. M. 1921. Cal. Pen. C. Sec. 1368.

Operation and Effect

Where the question of the defendant's present sanity is presented, it is within the sound discretion of the court to determine whether the matter should be inquired into in a special proceeding under the provisions of this section, whereas the question of the defendant's sanity at the time of the commission of the offense should be tried by the jury impaneled to pass upon his guilt or innocence of the crime charged. *State v. Peterson*, 25 M 81, 63 P 799.

The doubt mentioned in this section is one arising in the mind of the presiding judge, and must be left to his judicial conscience. Unless there be a doubt in the mind of the judge a quo—a doubt which he must legally determine as he would determine any other matter of grave import before him—he will not be warranted

in calling a special jury to try the issue. *State v. Howard*, 30 M 518, 528, 77 P 50.

Where, after judgment of death has been pronounced upon a defendant, there is good reason to suppose that he has become insane, the sheriff, with the concurrence of the judge of the court by which the judgment was rendered, may summon a jury to inquire into the question of his sanity in conformity with sections 94-8009 et seq.; but where during the course of the trial or before judgment of conviction is pronounced a doubt arises as to his mental condition, the procedure outlined by sections 94-9302 to 94-9307 is controlling. *State v. Vetter*, 77 M 66, 71 et seq., 249 P 666.

Where in a prosecution for homicide no attempt was made to prove insanity and the question of defendant's sanity during the trial or at any time was not suggested to the court, failure of the court to call a jury to determine his sanity, a matter addressed to its sound discretion, was not an abuse thereof. *State v. Schlaps*, 78 M 560, 575, 254 P 858.

94-9303. (12215) Trial of the question of insanity—charge of court.

The trial of the question of insanity must proceed in the following order:

1. The counsel for the defendant must open the case and offer evidence in support of the allegation of insanity.
2. The counsel for the state may then open their case, and offer evidence in support thereof.
3. The parties then may respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original cause.
4. When the evidence is concluded, unless the case is submitted to the jury on either or both sides without argument, the counsel for the state must commence, and the defendant or his counsel may conclude the argument to the jury.
5. If the indictment or information be for an offense punishable with death, two counsel on each side may argue the cause to the jury, in which case they must do so alternately. In other cases, the argument may be restricted to one counsel on each side.
6. The court must then charge the jury, stating to them all matters of law necessary for their information in giving their verdict.

History: En. Sec. 2522, Pen. C. 1895; 12215, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9522, Rev. C. 1907; re-en. Sec. 1369.

14 Am. Jur. 788, Criminal Law, §§ 32 Test of present insanity preventing et seq. trial or punishment. 3 ALR 94.

94-9304. (12216) Verdict of the jury as to sanity and proceedings thereon. If the jury find the defendant sane, the trial must proceed, or judgment be pronounced, as the case may be. If the jury find the defendant insane, the trial or judgment must be suspended until he becomes sane, and the court must order that he be in the meantime committed by the sheriff to the state insane asylum, and that upon his becoming sane he be redelivered to the sheriff.

History: En. Sec. 2523, Pen. C. 1895; 12216, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9523, Rev. C. 1907; re-en. Sec. 1370.

94-9305. (12217) If defendant is committed, it exonerates his bail, etc. The commitment of the defendant, as mentioned in the last section, exonerates his bail, or entitles a person, authorized to receive the property of the defendant, to a return of any money he may have deposited instead of bail.

History: En. Sec. 2524, Pen. C. 1895; Bail—73, 74 (1).
re-en. Sec. 9524, Rev. C. 1907; re-en. Sec. 8 C.J.S. Bail §§ 52, 53, 76.
12217, R. C. M. 1921. Cal. Pen. C. Sec. 1371.

94-9306. (12218) Defendant detained in asylum until he becomes sane. If the defendant is received into the asylum he must be detained there until he becomes sane. When he becomes sane, the superintendent must give notice of that fact to the sheriff and county attorney of the county. The sheriff must thereupon, without delay, bring the defendant from the asylum, and place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged. The sheriff must receive the actual expenses incurred and no more.

History: En. Sec. 2525, Pen. C. 1895; 12218, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9525, Rev. C. 1907; re-en. Sec. 1372.

94-9307. (12219) Expense of sending, etc., defendant to asylum. The expenses of sending the defendant to the asylum, of keeping him there, and of bringing him back, are in the first instance chargeable to the county in which the indictment was found, or the information filed; but the county may recover them from the estate of the defendant, if he have any, or from a relative, town, city, or county bound to provide for and maintain him elsewhere.

History: En. Sec. 2526, Pen. C. 1895; Code, in State ex rel. Dempsey v. District
re-en. Sec. 9526, Rev. C. 1907; re-en. Sec. Court, 24 M 566, 567, 63 P 389.
12219, R. C. M. 1921. Cal. Pen. C. Sec. 1373.

References

Cited or applied as section 2526, Penal

Insane Persons—55.

44 C.J.S. Insane Persons §§ 61, 75.

CHAPTER 94

COMPROMISING OFFENSES BY LEAVE OF COURT

- Section 94-9401. Compromise of offense for which civil action may be had.
94-9402. Compromise by permission of the court bars another prosecution.
94-9403. No public offense to be compromised except.

94-9401. (12220) Compromise of offense for which civil action may be had. When a defendant is held to answer on a charge of misdemeanor, for which the person injured by the act constituting the offense has a remedy by civil action, the offense may be compromised as provided in the next section, except when it is committed—

1. By or upon an officer of justice, while in the execution of the duties of his office;
2. Riotously;
3. With an intent to commit a felony.

History: En. Sec. 2540, Pen. C. 1895; re-en. Sec. 9527, Rev. C. 1907; re-en. Sec. 12220, R. C. M. 1921. Cal. Pen. C. Sec. 1377.

Operation and Effect

Where one charged with an offense which, under this section, may lawfully be compromised, voluntarily pays the amount involved in the criminal case for the purpose of settlement and the charge is withdrawn or dismissed, the payment is a tacit

admission that there was probable cause for instituting the criminal proceeding, and an action for malicious prosecution thereafter does not lie. *Saner v. Bowker*, 69 M 463, 466, 222 P 1056.

Contracts ~~128~~ (3).

17 C.J.S. Contracts § 228.

Dismissal of criminal proceedings as result of compromise or settlement as precluding action for malicious prosecution. 67 ALR 513.

94-9402. (12221) Compromise by permission of the court bars another prosecution. If the party injured appears before the court in which the trial is to be had, at any time before trial, and acknowledges that he has received satisfaction for the injury, the court may, in its discretion, on payment of costs incurred, order all proceedings to be stayed by the prosecution, and the defendant to be discharged therefrom; but in such case the reasons for the order must be set forth therein, and entered on the minutes. The order is a bar to another prosecution for the same offense.

History: En. Sec. 2541, Pen. C. 1895; 12221, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9528, Rev. C. 1907; re-en. Sec. 1378.

94-9403. (12222) No public offense to be compromised except. No public offense can be compromised, nor can any proceeding or prosecution for the punishment thereof upon a compromise be stayed, except as provided in this chapter.

History: En. Sec. 2542, Pen. C. 1895; 12222, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9529, Rev. C. 1907; re-en. Sec. 1379.

CHAPTER 95

DISMISSAL OF ACTIONS FOR WANT OF PROSECUTION OR OTHER REASONS

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| Section | 94-9501. When action may be dismissed. |
| | 94-9502. Case may be continued. |
| | 94-9503. Continuance and discharge from custody. |
| | 94-9504. If action dismissed, defendant to be discharged, etc. |
| | 94-9505. Dismissed on motion of court or application of county attorney. |
| | 94-9506. Nolle prosequi abolished. |
| | 94-9507. Dismissal a bar in misdemeanor, but not in felony. |

94-9501. (12223) When action may be dismissed. The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases:

1. Where a person has been held to answer for a public offense, if an information is not filed against him, within thirty days thereafter, or such time has not been extended by the court or judge.

2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within six months after the finding of the indictment, or filing of the information.

History: Ap. p. Sec. 179, p. 244, *Ban-nack Stat.*; re-en. Sec. 302, p. 236, *Cod. Stat.* 1871; re-en. Sec. 302, 3d Div. *Rev. Stat.* 1879; re-en. Sec. 303, 3d Div. *Comp. Stat.* 1887; en. Sec. 2550, *Pen. C.* 1895; re-en. Sec. 9530, *Rev. C.* 1907; re-en. Sec. 12223, *R. C. M.* 1921. *Cal. Pen. C. Sec.* 1382.

Operation and Effect

It is only by making timely objection before actively participating in the trial of a criminal prosecution against him that defendant can avail himself of the right to have the prosecution dismissed, under this section, because not brought to trial within six months after filing of the information; hence where motion to dismiss on that ground was not made until the trial had commenced and the jury had been sworn, he will be held to have waived the right. *State v. Test*, 65 M 134, 136, 211 P 217.

One charged with crime is, under this section, entitled to a dismissal of the information, whether he be imprisoned in the county jail or at liberty upon bail, if not brought to trial within six months after its filing, unless the state can show good cause why dismissal should not follow. *State v. Arkle*, 76 M 81, 86, 245 P 526.

Id. That the trial judge deemed it unwise, inexpedient and unnecessary to call a jury during the term at which a defendant should have been tried in order to come within the limitation of six months prescribed by this section for bringing him to trial, held not the "good cause" contemplated by the section, upon a showing of which a motion to dismiss the information may properly be denied.

A defendant is not entitled to a dismissal of the charge against him on the ground that he was not brought to trial within six months after the information was filed (this section) if the delay was caused by a mistrial. *State v. Turlok*, 76 M 549, 558, 248 P 169.

Purpose to Enforce Constitutional Right to a Speedy Trial

Statutes such as this, providing for the discharge of one accused of crime unless trial is had within a stated time after filing of information or indictment, are enacted for the purpose of enforcing the constitutional right to a speedy trial,

article III, section 16, constitution. *State v. McGowan*, 113 M 591, 594, 131 P 2d 262.

When Error to Dismiss New Information Charging Same Felony

On appeal by the state, dismissal of a second information filed with leave of court, charging the same offense, burglary, upon which a prior information had been dismissed one month previous for failure to bring the cause to trial within six months after filing, held erroneous under section 94-9507 providing that a prior dismissal of an action for a misdemeanor is a bar to another action for the same offense, but it is not a bar if the offense is a felony. *State v. McGowan*, 113 M 591, 593, 131 P 2d 262.

Where Section Not Applicable—Appeal, De Novo

Where defendant was tried within a week after the offense was committed, article III, section 16, constitution, providing for a speedy trial was complied with, but where, after conviction, he appealed to the district court for a trial de novo, he did not have the benefit of this section providing for dismissal of prosecution when not postponed on defendant's application if not brought to trial within six months, the section having no application under such facts. *State v. Schnell*, 107 M 579, 582, 88 P 2d 19.

References

State ex rel. Odenwald v. District Court, 98 M 1, 38 P 2d 269.

Criminal Law 576 (1).

22 C.J.S. *Criminal Law* § 472.

14 Am. Jur. 965, *Criminal Law*, §§ 292 et seq.

Duty to dismiss criminal proceedings on motion of attorney general or prosecuting attorney, pursuant to promise of immunity. 66 ALR 1378.

Court's power to enter nolle prosequi or dismiss prosecution. 69 ALR 240.

Validity and effect of agreement by prosecuting officer to extend immunity as regards particular charge upon condition that defendant plead guilty to another charge. 85 ALR 1177.

Court's duty or power as to continuation of prosecution upon refusal of pro-

secuting officer to proceed therewith. 103 ALR 1253.

Power of trial court to dismiss defendant for insufficiency of evidence after sub-

mitting a case to jury or after verdict of guilty. 131 ALR 187.

94-9502. (12224) Case may be continued. If, when application is made for the discharge of a defendant, under either subdivision of the next preceding section, the court is satisfied that there is material evidence on the part of the state, which cannot then be had; that reasonable exertions have been made to procure the same, and that there is just ground to believe that such evidence can be had at the succeeding term or session, or to such a reasonable time as may seem proper, the cause may be continued to the next term or session.

History: En. Sec. 2551, Pen. C. 1895; re-en. Sec. 9531, Rev. C. 1907; re-en. Sec. 12224, R. C. M. 1921.

Criminal Law 576 (11).
22 C.J.S. Criminal Law § 470.

94-9503. (12225) Continuance and discharge from custody. If the defendant is not brought to trial as provided in this chapter, and sufficient reason therefor is shown, the court may order the action to be continued from time to time, and in the meantime may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action is continued.

History: En. Sec. 2552, Pen. C. 1895; re-en. Sec. 9532, Rev. C. 1907; re-en. Sec. 12225, R. C. M. 1921. Cal. Pen. C. Sec. 1383.

94-9504. (12226) If action dismissed, defendant to be discharged, etc. If the court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom; or, if admitted to bail, his bail exonerated, or money deposited instead of bail must be refunded to him.

History: En. Sec. 2553, Pen. C. 1895; re-en. Sec. 9533, Rev. C. 1907; re-en. Sec. 12226, R. C. M. 1921. Cal. Pen. C. Sec. 1384.

References
Hassan v. Earll, 61 M 389, 392, 202 P 581.

94-9505. (12227) Dismissed on motion of court or application of county attorney. The court may, either of its own motion or upon the application of the county attorney, and in furtherance of justice, order an action, information, or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes.

History: En. Sec. 2554, Pen. C. 1895; re-en. Sec. 9534, Rev. C. 1907; re-en. Sec. 12227, R. C. M. 1921. Cal. Pen. C. Sec. 1385.

of a pending criminal action, and mandamus will not issue to control the court's discretion. State ex rel. Anderson v. Gile, ___ M ___, 172 P 2d 583, 585.

Operation and Effect

Since the legislature did not define the phrase "in furtherance of justice" as used in the above section, it is left for the court's judicial discretion, exercised in view of a defendant's constitutional rights and the interests of society, to determine what particular grounds warrant dismissal

References

State ex rel. Odenwald v. District Court, 98 M 1, 38 P 2d 269; State v. Labbitt, 117 M 26, 34, 156 P 2d 163.

Criminal Law 303.
22 C.J.S. Criminal Law § 464.

94-9506. (12228) Nolle prosequi abolished. The entry of a nolle prosequi is abolished, and neither the attorney general nor the county attorney can discontinue or abandon a prosecution of a public offense, except as provided in the last section.

History: En. Sec. 2555, Pen. C. 1895; re-en. Sec. 9535, Rev. C. 1907; re-en. Sec. 12228, R. C. M. 1921. Cal. Pen. C. Sec. 1386.

Criminal Law 302 (1).

22 C.J.S. Criminal Law §§ 458, 459, 461-463.

References

State v. Peck, 83 M 327, 332, 271 P 707.

94-9507. (12229) Dismissal a bar in misdemeanor, but not in felony.

An order for the dismissal of an action, as provided in this chapter, is a bar to any other prosecution for the same offense if it is a misdemeanor, but it is not a bar if the offense is a felony.

History: En. Sec. 2556, Pen. C. 1895; re-en. Sec. 9536, Rev. C. 1907; re-en. Sec. 12229, R. C. M. 1921. Cal. Pen. C. Sec. 1387.

Dismissal of an information before defendant is called upon to plead or before the jury is impaneled and sworn does not bar a subsequent prosecution for the same offense. State v. Knilans, 69 M 8, 15, 220 P 91.

Dismissal Not Bar in Contempt Proceedings

While a contempt proceeding is criminal in its nature it is not a criminal prosecution, and where such a proceeding was dismissed before hearing without prejudice, and a new one was thereafter instituted by an attorney as relator, dismissal of the first citation did not constitute a bar to any further prosecution under this section, and contemnor's special plea in bar was insufficient either to constitute a bar or a defense to the proceeding in contempt. State ex rel. Hall v. Niewoehner, 116 M 437, 449, 155 P 2d 205.

A special plea in bar to a criminal proceeding, such as that a prior proceeding of the same nature had been dismissed, which dismissal, under this section, constitutes a bar to further prosecution where the offense constitutes a misdemeanor, is but a preliminary matter in nowise connected with the trial, since the plea must be entered before the accused pleads to the merits. State ex rel. Odenwald v. District Court, 98 M 1, 6, 38 P 2d 269.

On appeal by the state, dismissal of a second information filed with leave of court, charging the same offense, burglary, upon which a prior information had been dismissed one month previous for failure to bring the cause to trial within six months after filing, held erroneous under this section, burglary being a felony. State v. McGowan, 113 M 591, 593, 131 P 2d 262.

Operation and Effect

This section, providing that the dismissal of a prosecution for felony is not a bar to a second prosecution, is not decisive of the question of former jeopardy. State v. Gaimos, 53 M 118, 121, 162 P 596.

Criminal Law 178.

22 C.J.S. Criminal Law §§ 254, 256, 257.

CHAPTER 96

PROCEEDINGS AGAINST CORPORATIONS

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| Section | 94-9601. | Summons upon information against corporation. |
| | 94-9602. | Form of summons. |
| | 94-9603. | When and how served. |
| | 94-9604. | Examination of the charge. |
| | 94-9605. | Certificate of magistrate and return. |
| | 94-9606. | County attorney to file information. |
| | 94-9607. | Appearance and plea. |
| | 94-9608. | Fine on conviction, how collected. |
| | 94-9609. | Summons to corporation. |
| | 94-9610. | Service of summons. |

94-9601. (12230) Summons upon information against corporation. Upon a complaint against a corporation, the magistrate must issue a summons signed by him, with his name of office, requiring the corporation to appear before him, at a specified time and place, to answer the charge, the time to be not less than ten days after the issuing of the summons.

History: En. Sec. 2570, Pen. C. 1895; Code, in State v. Mitchell, 17 M 67, 75, re-en. Sec. 9537, Rev. C. 1907; re-en. Sec. 42 P 100.
12230, R. C. M. 1921. Cal. Pen. C. Sec. 1390.

References

Cited or applied as section 2570, Penal

Corporations 531.

19 C.J.S. Corporations § 1368.

94-9602. (12231) Form of summons. The summons must be substantially in the following form:

"County of (as case may be).

"The State of Montana to the (naming the corporation):

"You are hereby summoned to appear before me at (naming the place), on (specifying the day and hour), to answer a charge made against you upon the complaint of A B for (designating the offense generally).

"Dated at the city (or township) of _____, this _____ day of _____, nineteen_____.

"G H, Justice of the Peace (or as the case may be)."

History: En. Sec. 2571, Pen. C. 1895; 12231, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9538, Rev. C. 1907; re-en. Sec. 1391.

94-9603. (12232) When and how served. The summons must be served at least five days before the day of appearance fixed therein, by delivering a copy thereof and showing the original to the president or other head of the corporation, or to the secretary, cashier, or managing agent thereof.

History: En. Sec. 2572, Pen. C. 1895; 12232, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9539, Rev. C. 1907; re-en. Sec. 1392.

94-9604. (12233) Examination of the charge. At the appointed time in the summons the magistrate must proceed to investigate the charge in the same manner as in the case of a natural person, so far as these proceedings are applicable.

History: En. Sec. 2573, Pen. C. 1895; re-en. Sec. 9540, Rev. C. 1907; re-en. Sec. 12233, R. C. M. 1921. Cal. Pen. C. Sec. 1393.

Corporations 532.

19 C.J.S. Corporations § 1366.

94-9605. (12234) Certificate of magistrate and return. After hearing the proofs, the magistrate must certify upon the complaint, either that there is or is not sufficient cause to believe the corporation guilty of the offense charged, and must return the complaint and certificate, as prescribed in section 94-6124.

History: En. Sec. 2574, Pen. C. 1895; 12234, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9541, Rev. C. 1907; re-en. Sec. 1394.

94-9606. (12235) County attorney to file information. If the magistrate returns a certificate that there is sufficient cause to believe the corporation guilty of the offense charged the county attorney may file an information thereof, as in case of a natural person held to answer, or he may file such information by leave of the court.

History: En. Sec. 2575, Pen. C. 1895; re-en. Sec. 9542, Rev. C. 1907; re-en. Sec. 12235, R. C. M. 1921. Cal. Pen. C. Sec. 1395.

Corporations 533.

19 C.J.S. Corporations § 1367.

94-9607. (12236) Appearance and plea. If an indictment is found, or information is filed, the corporation may appear by counsel to answer the same. If it does not thus appear, a plea of not guilty must be entered, and the same proceedings had thereon as in other cases.

History: En. Sec. 2576, Pen. C. 1895; Corporations 534.
 re-en. Sec. 9543, Rev. C. 1907; re-en. Sec. 19 C.J.S. Corporations § 1369.
 12236, R. C. M. 1921. Cal. Pen. C. Sec. 1396.

94-9608. (12237) Fine on conviction, how collected. When a fine is imposed upon a corporation on conviction it may be collected by virtue of the order imposing it, by the sheriff of the county, out of its real and personal property, in the same manner as upon an execution in a civil action.

History: En. Sec. 2577, Pen. C. 1895; Corporations 536.
 re-en. Sec. 9544, Rev. C. 1907; re-en. Sec. 19 C.J.S. Corporations § 1371.
 12237, R. C. M. 1921. Cal. Pen. C. Sec. 1397.

94-9609. (12238) Summons to corporation. When an indictment is found or an information filed against a corporation, the clerk must issue a summons in its corporate name, commanding it to appear and answer the indictment or information, a copy of which summons must be served on an officer of said corporation, or upon its agent or attorney designated as the person upon whom service of summons in civil actions may be made, if there be any such in the county where the indictment is found or information is filed; and if there be no officer or designated agent or attorney in the county where the indictment or information is found or filed, then upon any managing agent, ticket agent, clerk, cashier, or secretary, freight agent, superintendent, or general business manager in the county; and if there be none of the above described persons in the county, then upon any of such persons in any county in the state. Such notice must be served at least five days before the time at which the said corporation is by summons required to appear.

History: En. Sec. 470, 3d Div. Comp. 12238, R. C. M. 1921. Cal. Pen. C. Sec. Stat. 1887; amd. Sec. 2578, Pen. C. 1895; 1390.
 re-en. Sec. 9545, Rev. C. 1907; re-en. Sec.

94-9610. (12239) Service of summons. When the sheriff or other officer returns the summons, certifying the service thereof, the corporation must, on and after the day appointed in such summons for its appearance, be considered in default, and the court must order the clerk to enter appearance for the corporation, and enter the plea of not guilty in the records of the court, and further proceedings may be had thereon as if the corporation had appeared and pleaded not guilty thereto; and if the corporation is convicted, the court must enter judgment for the amount of the fine and costs which may be awarded against it, in the same manner as on judgment in civil action.

History: Ap. p. Sec. 471, 3d Div. Comp. Stat. 1887; en. Sec. 2579, Pen. C. 1895; re-en. Sec. 9546, Rev. C. 1907; re-en. Sec. 12239, R. C. M. 1921. Cal. Pen. C. Secs. 1391-1392.

References

Cited or applied as section 2579, Penal Code, in *State v. Mitchell*, 17 M 67, 75, 42 P 100.

CHAPTER 97

DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED

- Section 94-9701. Peace officer must hold property subject to order of magistrate.
 94-9702. Order for its delivery to owner.
 94-9703. Magistrate must deliver it to owner.
 94-9704. Court in which trial is had may order its delivery.
 94-9705. Delivered to county treasurer if not claimed in six months.
 94-9706. Receipt for money, etc., taken from person arrested.
 94-9707. Record of property alleged to be stolen.

94-9701. (12240) Peace officer must hold property subject to order of magistrate. When property, alleged to have been stolen or embezzled, comes into the custody of a peace officer, he must hold it subject to the order of the magistrate authorized by the next section to direct the disposal thereof.

History: En. Sec. 2610, Pen. C. 1895; Criminal Law 1221.
 re-en. Sec. 9549, Rev. C. 1907; re-en. Sec. 24 C.J.S. Criminal Law §§ 2004, 2006.
 12240, R. C. M. 1921. Cal. Pen. C. Sec. 1407.

94-9702. (12241) Order for its delivery to owner. On satisfactory proof of the ownership of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling it, must order it to be delivered to the owner, on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property.

History: En. Sec. 2611, Pen. C. 1895; 12241, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9550, Rev. C. 1907; re-en. Sec. 1408.

94-9703. (12242) Magistrate must deliver it to owner. If property stolen or embezzled comes into custody of the magistrate, it must be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate.

History: En. Sec. 2612, Pen. C. 1895; 12242, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9551, Rev. C. 1907; re-en. Sec. 1409.

94-9704. (12243) Court in which trial is had may order its delivery. If the property stolen or embezzled has not been delivered to the owner, the court before which a trial is had for stealing or embezzling it may, on proof of his title, order it to be restored to the owner.

History: En. Sec. 2613, Pen. C. 1895; 12243, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9552, Rev. C. 1907; re-en. Sec. 1410.

94-9705. (12244) Delivered to county treasurer if not claimed in six months. If the property stolen or embezzled is not claimed by the owner before the expiration of six months from the conviction of a person for stealing or embezzling it, the magistrate or officer having it in custody must, on the payment of the necessary expenses incurred in its preservation, deliver it to the county treasurer, by whom it must be sold and the proceeds paid into the county treasury.

History: En. Sec. 2614, Pen. C. 1895; 12244, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9553, Rev. C. 1907; re-en. Sec. 1411.

94-9706. (12245) Receipt for money, etc., taken from person arrested.

When money or other property is taken from a defendant, arrested upon a charge of a public offense, the officer taking it must at the time give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant and the other of which he must forthwith file with the clerk of the court to which the complaint and statement are to be sent. When such property is taken by a police officer of any incorporated city or town, he must deliver one of the receipts to the defendant, and one, with the property, at once to the clerk or other person in charge of the police office in such city or town.

History: En. Sec. 2615, Pen. C. 1895; 12245, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9554, Rev. C. 1907; re-en. Sec. 1412.

94-9707. (12246) Record of property alleged to be stolen. The clerk in, or person having charge of, the police office in any incorporated city or town, must enter in a suitable book a description of every article of property alleged to be stolen or embezzled, and brought into the office or taken from the person of a prisoner, and must attach a number to each article, and make a corresponding entry thereof.

History: En. Sec. 2616, Pen. C. 1895; 12246, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9555, Rev. C. 1907; re-en. Sec. 1413.

CHAPTER 98

PARDONS—COMMUTATIONS—REMISSIONS—RESPITES—BOARD OF PARDONS

- Section 94-9801. Power of governor to grant pardons—board of pardons, how composed.
 94-9802. Meetings of the board.
 94-9803. Notice of pardon from the governor, board to convene.
 94-9804. Order of the board fixing time for hearing—form of order.
 94-9805. Publication of order.
 94-9806. Proof of publication.
 94-9807. Record of meeting, what to contain.
 94-9808. Counsel may be heard.
 94-9809. Decision and papers to be transmitted to secretary of state.
 94-9810. Decision and dissent to be recorded.
 94-9811. Board to keep a record, what to contain.
 94-9812. Board may prescribe rules.
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 94-9814. Governor may require report from judge.
 94-9815. When publication not necessary.
 94-9816. Governor may respite.
 94-9817. May restore to citizenship.
 94-9818. Parole of prisoners in state prison.
 94-9819. Paroled prisoners still in legal custody.
 94-9820. Applications for parole.

94-9801. (12247) Power of governor to grant pardons—board of pardons, how composed. The governor has the power to grant pardons, absolute or conditional, and to remit fines and forfeitures, and to grant commutation of punishments and respites after conviction, and judgment for offenses committed against the criminal law of this state; provided, that before granting pardons, remitting fines and forfeitures, or commuting punishments, the action of the governor concerning the same shall be approved by a board, or a majority thereof, composed of the secretary of state,

attorney general, and state auditor, who shall be known as the board of pardons.

History: The board of pardons was created by act of March 9, 1891; Laws of 1891, pp. 191-195. See California Penal Code, Secs. 1418-1423, for similar sections. En. Sec. 2630, Pen. C. 1895; re-en. Sec. 9556, Rev. C. 1907; re-en. Sec. 12247, R. C. M. 1921. Cal. Pen. C. Sec. 1417.

Operation and Effect

In the exercise of the pardoning power, the governor is authorized to impose conditions without restriction, so long as they are not illegal, immoral, or impossible of performance. In re Sutton, 50 M 88, 93, 145 P 6.

References

Anderson et al. v. Wirkman, 67 M 176, 186, 215 P 224.

Pardon⇒4.

46 C.J. Pardons § 10 et seq.

39 Am. Jur. 528, Pardon, Reprieve and Amnesty, §§ 15 et seq.

Right to notice and hearing before revocation of suspension of sentence, parol or conditional burden. 54 ALR 1471.

Statutes relating to parole or pardon of convicted criminals as subject to objection of denial of equal protection of laws. 152 ALR 1108.

94-9802. (12248) Meetings of the board. The board must hold regular meetings at its office at the seat of government, on the second Monday of each month, and such special meetings as the president, or any two members, may direct.

History: En. Sec. 3, p. 192, L. 1891; amd. Sec. 2631, Pen. C. 1895; re-en. Sec. 9557, Rev. C. 1907; re-en. Sec. 12248, R. C. M. 1921.

Pardon⇒5.

46 C.J. Pardons §§ 12, 23.

94-9803. (12249) Notice of pardon from the governor, board to convene. Upon the receipt of a notice in writing from the governor that he has granted a pardon, absolute or conditional, or remitted a fine or forfeiture, or commuted a punishment of any person after conviction and judgment for any offense committed against the criminal laws of this state, the board must immediately convene for the consideration thereof.

History: En. Sec. 4, p. 192, L. 1891; amd. Sec. 2632, Pen. C. 1895; re-en. Sec. 9558, Rev. C. 1907; re-en. Sec. 12249, R. C. M. 1921.

Pardon⇒7.

46 C.J. Pardons §§ 12, 23.

94-9804. (12250) Order of the board fixing time for hearing—form of order. At such meeting the board must pass an order in substance as follows:

"Whereas, the governor has this day officially notified the board that he has granted a pardon (commutation of punishment or remitted a fine or forfeiture as the case may be), to one, a convict confined in the state prison (or to one, who has been found guilty of an offense committed against the laws of the state), who was convicted of the crime of committed at, in the county of, state of Montana, on the day of, 19....., and sentenced for a term of years.

"Therefore, be it ordered that the day of, 19....., be set apart for the consideration of said (pardon, remission of fine or forfeiture, or commutation of punishment as the case may be) so granted (or commuted) as aforesaid; and all persons having an interest therein desiring to be heard either for or against the granting of the pardon (or commutation, remission of the fine or forfeiture) are

hereby notified to be present at _____, noon of said day, at the office of the board of pardons at the seat of government.

"Further ordered that a copy of this order be printed and published in the _____ (here insert name of some newspaper of general circulation in the county where the crime was committed) a daily (or weekly) newspaper printed and published at _____ in the county of _____, once each week for two weeks, beginning _____, 19____, and ending _____."

History: En. Sec. 5, p. 192, L. 1891; 9559, Rev. C. 1907; re-en. Sec. 12250, amd. Sec. 2633, Pen. C. 1895; re-en. Sec. R. C. M. 1921.

94-9805. (12251) Publication of order. The board must cause a copy of such order to be published in the newspaper therein designated, at least once a week for two weeks prior to the hearing, and at the same time cause to be deposited in the postoffice at the seat of government, postpaid, a copy of said order and notice addressed to the district judge, county attorney and sheriff, respectively, of the county where the crime was committed, and in like manner mail a copy of the order to the petitioner and the convict.

History: En. Sec. 6, p. 193, L. 1891; 9560, Rev. C. 1907; re-en. Sec. 12251, amd. Sec. 2634, Pen. C. 1895; re-en. Sec. R. C. M. 1921.

94-9806. (12252) Proof of publication. Prior to the time set for hearing, proof of the publication of notice must be made by the publisher or managing agent.

History: En. Sec. 2635, Pen. C. 1895; re-en. Sec. 9561, Rev. C. 1907; re-en. Sec. 12252, R. C. M. 1921.

94-9807. (12253) Record of meeting, what to contain. At the hearing the board must cause to be kept a record showing—

1. The name of all persons appearing before the board on behalf of the person pardoned by the governor;
2. The name of all persons appearing before the board in opposition to the granting of the same;
3. The testimony of all persons giving evidence before the board;
4. That the affidavit and return from the printer of the publication of the notice and order of hearing was on file prior to the hearing.

History: En. Sec. 8, p. 194, L. 1891; 9562, Rev. C. 1907; re-en. Sec. 12253, re-en. Sec. 2636, Pen. C. 1895; re-en. Sec. R. C. M. 1921.

94-9808. (12254) Counsel may be heard. The petitioner, as well as parties opposed to granting the relief sought, may, in the discretion of the board, be heard by counsel.

History: En. Sec. 9, p. 194, L. 1891; 9563, Rev. C. 1907; re-en. Sec. 12254, re-en. Sec. 2637, Pen. C. 1895; re-en. Sec. R. C. M. 1921.

94-9809. (12255) Decision and papers to be transmitted to secretary of state. Within twenty days after the hearing of any case the board must file with the secretary of state its decision in writing, together with all papers used in each case, and transmit a copy of the decision to the governor.

History: En. Sec. 10, p. 194, L. 1891; 9564, Rev. C. 1907; re-en. Sec. 12255, re-en. Sec. 2638, Pen. C. 1895; re-en. Sec. R. C. M. 1921.

94-9810. (12256) Decision and dissent to be recorded. The decision must be entered at length in the record of proceedings of the board, and the dissent of any member thereto must be filed and entered at the same time.

History: En. Sec. 11, p. 194, L. 1891; 9565, Rev. C. 1907; re-en. Sec. 12256, amd. Sec. 2639, Pen. C. 1895; re-en. Sec. R. C. M. 1921.

94-9811. (12257) Board to keep a record, what to contain. The board must keep a record of its proceedings, in which must appear a copy of all notices of the granting of pardons, absolute or conditional, the remission of fines or forfeitures, the commutation of punishment transmitted by the governor, with a list of the signatures and recommendations in favor of each applicant; also stating therein—

1. The name of the convict;
2. The crime of which he was convicted;
3. The term of sentence and its date;
4. The date of commutation, pardon, or remission.

History: En. Sec. 12, p. 194, L. 1891; 9566, Rev. C. 1907; re-en. Sec. 12257, re-en. Sec. 2640, Pen. C. 1895; re-en. Sec. R. C. M. 1921.

94-9812. (12258) Board may prescribe rules. The board may prescribe such rules and regulations for the discharge of its duties, not inconsistent with the provisions of law, as it may deem necessary.

History: En. Sec. 2641, Pen. C. 1895; re-en. Sec. 9567, Rev. C. 1907; re-en. Sec. 12258, R. C. M. 1921.

94-9813. (12259) Governor to report to legislative assembly. The governor must communicate to the legislative assembly at each regular session, each case of remission of fine or forfeiture, reprieve, commutation, or pardon granted since the last previous report, stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of remission, commutation, pardon or reprieve, with the reason for granting the same, and the objection, if any, of any of the members of the board made thereto.

History: En. Sec. 2642, Pen. C. 1895; re-en. Sec. 9568, Rev. C. 1907; re-en. Sec. 12259, R. C. M. 1921.

94-9814. (12260) Governor may require report from judge. When an application is made to the governor for a pardon, he may require the judge of the court before which the conviction was had, or the county attorney by whom the action was prosecuted, to furnish him, without delay, with a statement of the facts on the trial, and any other facts having reference to the propriety of granting or refusing the pardon.

History: En. Sec. 2643, Pen. C. 1895; re-en. Sec. 9569, Rev. C. 1907; re-en. Sec. 12260, R. C. M. 1921.

94-9815. (12261) When publication not necessary. No publication need be made as provided in section 94-9804, in the following cases:

1. When there is imminent danger of the death of the person convicted or imprisoned.

2. When the term of imprisonment of the applicant is within ten days of its expiration.

History: En. Sec. 2644, Pen. C. 1895;
re-en. Sec. 9570, Rev. C. 1907; re-en. Sec.
12261, R. C. M. 1921.

94-9816. (12262) Governor may respite. The governor has the power to grant respites after conviction and judgment, for any offenses committed against the criminal laws of the state, for such time as he thinks proper.

History: En. Sec. 2645, Pen. C. 1895; Pardon 12.
re-en. Sec. 9571, Rev. C. 1907; re-en. Sec. 46 C.J. Pardons § 42 et seq.
12262, R. C. M. 1921.

94-9817. (12263) May restore to citizenship. The governor has power to restore to citizenship any person convicted of any offense committed against the laws of the state, upon cause being shown, either after the expiration of sentence, or after pardon.

History: En. Sec. 2646, Pen. C. 1895; References
re-en. Sec. 9572, Rev. C. 1907; re-en. Sec. State ex rel. Bottomly v. District Court,
12263, R. C. M. 1921. 73 M 541, 550, 237 P 525.

Convicts 1.
18 C.J.S. Convicts §§ 2, 4.

94-9818. (12264) Parole of prisoners in state prison. The governor may recommend and the state board of prison commissioners may parole any inmate of the state prison, under such reasonable conditions and regulations as may be deemed expedient, and adopted by such state board; providing, however,

1. That no convict shall be paroled who has been previously convicted of a felony other than the one for which he is serving sentence, either in this state or elsewhere;

2. That no convict serving a time sentence shall be paroled until he shall have served at least one-half of his full term, not reckoning his good time; except that any convict serving a time sentence may be paroled after he shall have served, upon his term of sentence, twelve and one-half years;

3. No convict, serving a life sentence, shall be paroled until he shall have served twenty-five years, less the diminution which would have been allowed for good conduct had his sentence been for twenty-five years, and then only by unanimous consent, in writing, of the members of the board of pardons.

History: En. Sec. 1, Ch. 95, L. 1907;
Sec. 9573, Rev. C. 1907; re-en. Sec. 12264,
R. C. M. 1921.

Operation and Effect

The act of the governor, in granting a conditional release from the penitentiary of a person convicted of crime, is closely assimilated to a parole, which the governor has authority to grant under certain restrictions. In re Sutton, 50 M 88, 94, 145 P 6.

The effect of a parole granted a convict is to suspend the execution of the judgment until the end of the term of im-

prisonment, or until the paroled prisoner is rearrested for breach of the parole, and hence where such a prisoner was not rearrested after parole and enjoyed his liberty from the time of his discharge until the end of his term, he was thereafter prima facie rightfully at large and not subject to further restraint for the crime for which he was committed to prison. Anderson et al. v. Wirkman, 67 M 176, 186, 215 P 224.

Id. In the absence of countervailing evidence, the presumption obtains that the state prison board in paroling a prisoner sentenced to life imprisonment

for murder regularly performed its duty and before granting the parole commuted his sentence, since without commutation in such case parole is not authorized by law.

References

Cited or applied as section 9573, Revised Codes, in *In re Collins*, 51 M 215, 217, 152 P 40; *State v. Hukoveh*, 115 M 125, 131, 139 P 2d 538.

Pardon↔4.

46 C.J. Pardons § 10 et seq.

39 Am. Jur. 572, Pardon, Reprieve and Amnesty, §§ 81 et seq.

Statutes relating to parole or pardon of convicted criminals as subject to objection of denial of equal protection of laws. 152 ALR 1108.

94-9819. (12265) **Paroled prisoners still in legal custody.** All such convicts, while on parole, shall remain in the legal custody and under the control of the state board of prison commissioners, and subject at any time to be returned to the state prison, either for breach of the conditions of his parole, or otherwise, and the written order of such board of prison commissioners, certified by the state prison contractors, or the warden or other officers in charge of the state prison, shall be sufficient warrant to any officer to retake and return to actual custody any such convict. Geographical limits wholly within the state may be fixed in each case of parole, and the same shall be enlarged or reduced according to the conduct of the prisoner; provided, that such paroled prisoners shall be required to report in writing to said board of prison commissioners at least once in every three months, stating their postoffice address, the nature and kind of work or employment in which they are engaged, or in which they have been engaged since the last report, and such other information and facts as may be required by the rules and regulations of said board.

History: En. Sec. 2, Ch. 95, L. 1907; Sec. 9574, Rev. C. 1907; re-en. Sec. 12265, R. C. M. 1921.

Pardon↔14.

46 C.J. Pardons § 32 et seq.

94-9820. (12266) **Applications for parole.** In considering applications for parole, the state board of prison commissioners shall not entertain any petition, or receive any written communication, or hear any argument from any attorney or other person not connected with said state prison, in favor of the parole of the prisoner, but the state board may institute inquiries by correspondence, or otherwise, as to the previous history or character of such prisoner.

History: En. Sec. 3, Ch. 95, L. 1907; Sec. 9575, Rev. C. 1907; re-en. Sec. 12266, R. C. M. 1921.

Codes, in *In re Sutton*, 50 M 88, 94, 145 P 6.

References

Cited or applied as section 9575, Revised

Pardon↔7.

46 C.J. Pardons § 23.

CHAPTER 99

BASTARDY PROCEEDINGS

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| Section | 94-9901. Complaint in bastardy, what to contain, how entitled. |
| | 94-9902. Clerk to give notice, how and to whom. |
| | 94-9903. Lien upon real property, how created and for what. |
| | 94-9904. Judge may order attachment without bond, when. |
| | 94-9905. County attorney required to prosecute. |
| | 94-9906. Issue on the trial shall be "guilty" or "not guilty." |
| | 94-9907. Judgment and liability where accused found guilty. |
| | 94-9908. Power of court over judgments and orders. |

94-9901. (12267) Complaint in bastardy, what to contain, how entitled. When any woman residing in any county of the state is delivered of a bastard child, or is pregnant with a child which, if born alive, will be a bastard, complaint may be made in writing by any person to the district court of the county where she resides, stating that fact, and charging the proper person with being the father thereof. The proceeding must be entitled in the name of the state against the accused as defendant.

History: Earlier acts were Secs. 1-6, pp. 40-43, L. 1874; re-en. Secs. 93-98, 5th Div. Rev. Stat. 1879; re-en. Secs. 150-155, 5th Div. Comp. Stat. 1887.

This section en. Sec. 2660, Pen. C. 1895; re-en. Sec. 9576, Rev. C. 1907; re-en. Sec. 12267, R. C. M. 1921.

Constitutionality

Held, that the bastardy statute (secs. 94-9901 to 94-9908) is not unconstitutional on the theory of defect of title, based on the fact that, while proceedings in bastardy are civil in nature, it is found in the Penal Code having to do with crimes and criminal procedure, since the Codes of 1921 were adopted as one Act and the statute was merely carried forward from the Penal Code of 1895 into the codification of 1921, without amendment, as a matter of classification and convenience. State ex rel. Glasgow v. Hedrick, 88 M 551, 555, 294 P 375.

Bastards—33, 40.

10 C.J.S. Bastards §§ 51, 52, 63.

7 Am. Jur. 679, Bastards, §§ 79 et seq.

Marriage of woman to one other than defendant as affecting bastardy proceedings. 14 ALR 974.

Nonstatutory duty of father to support illegitimate child. 30 ALR 1069.

Death of principal as relieving against liability on bastardy bond. 31 ALR 602.

Validity and enforceability of promise to support or provide for illegitimate child. 39 ALR 434.

Admissibility and weight of evidence of resemblance on question of paternity or other relationship. 40 ALR 97 and 95 ALR 314.

Right of mother to custody of illegitimate child. 51 ALR 1507.

Financial status of defendant in bastardy proceedings as affecting amount of award for support and maintenance. 74 ALR 763.

Admissibility in prosecution for bastardy of evidence of prosecutrix's acquaintance or association with men other than defendant, on issue of paternity of child. 104 ALR 84.

Admissibility of evidence in a bastardy proceeding of defendant's reputation or character as to chastity and morality. 110 ALR 335.

Death of putative father before, pending, or after judgment as affecting bastardy proceedings. 119 ALR 632.

Temporary allowance for support or costs pending action or proceedings for declaration of paternity of an illegitimate child. 136 ALR 1264.

94-9902. (12268) Clerk to give notice, how and to whom. Upon the filing of the complaint, duly verified, the clerk must cause notice to be given to the person so charged, as in an ordinary action.

History: En. Sec. 2661, Pen. C. 1895; re-en. Sec. 9577, Rev. C. 1907; re-en. Sec. 12268, R. C. M. 1921.

Bastards—42.

10 C.J.S. Bastards § 65.

94-9903. (12269) Lien upon real property, how created and for what. From the time of the filing of such complaint, a lien is created upon the real property of the accused in the county where the action is pending, for the payment of any money and the performance of any order adjudged by the proper court; but no lien attaches until notice of the pendency of the action is filed in the county clerk's office of the county where the real property is situated.

History: En. Sec. 2662, Pen. C. 1895; re-en. Sec. 9578, Rev. C. 1907; re-en. Sec. 12269, R. C. M. 1921.

Bastards—81.

10 C.J.S. Bastards § 116.

94-9904. (12270) Judge may order attachment without bond, when. The district judge may order an attachment to issue thereon without an

undertaking, which order must specify the amount of property to be seized under the attachment, and may be revoked at any time by such judge or the court, on a showing made to either for a revocation of the same, and on such terms as such court or judge may deem proper in the premises.

History: En. Sec. 2663, Pen. C. 1895;
re-en. Sec. 9579, Rev. C. 1907; re-en. Sec.
12270, R. C. M. 1921.

94-9905. (12271) County attorney required to prosecute. The county attorney, on being notified of the facts, must prosecute the matter in behalf of the complainant.

History: En. Sec. 2664, Pen. C. 1895;
re-en. Sec. 9580, Rev. C. 1907; re-en. Sec.
12271, R. C. M. 1921.

94-9906. (12272) Issue on the trial shall be "guilty" or "not guilty." The issue on the trial is "guilty" or "not guilty," and must be tried as an ordinary action.

History: En. Sec. 2665, Pen. C. 1895;
re-en. Sec. 9581, Rev. C. 1907; re-en. Sec.
12272, R. C. M. 1921.

Bastards 72.

10 C.J.S. Bastards § 107.

94-9907. (12273) Judgment and liability where accused found guilty. If the accused is found guilty he must be charged with the maintenance of the child, in such sum, and in such manner as the court directs, with the costs of suit; and the clerk may issue execution for any sum ordered, to be paid immediately, and afterwards, from time to time, as may be required to compel compliance with the order of the court, and the defendant may be committed to the county jail until he complies with the order or judgment.

History: En. Sec. 2666, Pen. C. 1895;
re-en. Sec. 9582, Rev. C. 1907; re-en. Sec.
12273, R. C. M. 1921.

Operation and Effect

Quaere: May a putative father, if found guilty under the bastardy statute, be released from the obligation imposed upon him, by this section, to support his bastard child, by agreement with the prosecutrix before the birth of the child? *State ex rel. Glasgow v. Hedrick*, 88 M 551, 558, 294 P 375.

Monthly Allowance of \$25 for Maintenance of Child Held Warranted

Award of \$25 per month for the maintenance of a child born out of wedlock to be paid by defendant in a bastardy proceeding, held not unwarranted by the evidence showing that while he was earning only \$55 at the time of trial, he had at times earned as much as \$120 per month. *State v. Kuilman*, 111 M 459, 462, 110 P 2d 969.

Bastards 78, 81, 83.

10 C.J.S. Bastards §§ 111, 116, 117.

94-9908. (12274) Power of court over judgments and orders. The court may at any time enlarge, diminish, or vacate any order or judgment rendered in the proceedings, on such notice to the defendant as the court or judge may prescribe.

History: En. Sec. 2667, Pen. C. 1895;
re-en. Sec. 9583, Rev. C. 1907; re-en. Sec.
12274, R. C. M. 1921.

Bastards 75.

10 C.J.S. Bastards §§ 109, 110, 112-114.

CHAPTER 100

JUSTICES' AND POLICE COURT PROCEEDINGS—APPEALS

Section	94-100-1.	Proceedings must be by complaint.
	94-100-2.	When warrant of arrest must issue—form.
	94-100-3.	Minutes, how kept.
	94-100-4.	Plea, how put in.
	94-100-5.	Issue, how tried.
	94-100-6.	Change of venue, when granted.
	94-100-7.	Papers and proceedings to be transferred.
	94-100-8.	True name of defendant.
	94-100-9.	Same.
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	94-100-13.	Postponement.
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	94-100-19.	Court decides questions of law.
	94-100-20.	Jury may decide in court or retire.
	94-100-21.	Verdict, how delivered and entered.
	94-100-22.	Verdict when several defendants are tried.
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	94-100-25.	Proceedings on plea of guilty or on conviction.
	94-100-26.	Jury may fix punishment.
	94-100-27.	Justice may modify same.
	94-100-28.	Fine or imprisonment.
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	94-100-33.	Defendant may appeal.
	94-100-34.	Notice of appeal.
	94-100-35.	Undertaking for fine and costs.
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	94-100-37.	Undertaking on judgment of imprisonment.
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	94-100-39.	Defendant must be discharged on acquittal.
	94-100-40.	Judgment of imprisonment or fine, how executed.
	94-100-41.	Defendant may be admitted to bail at any time.
	94-100-42.	Subpoena.
	94-100-43.	Entitling affidavits.
	94-100-44.	Police courts defined.
	94-100-45.	Officer must pay fines to justice.
	94-100-46.	Justices must pay fines to treasurer.

94-100-1. (12302) Proceedings must be by complaint. All proceedings and actions before a justice's or police court, for a public offense of which such courts have jurisdiction, must be commenced by complaint under oath, setting forth the offense charged, with such particulars of time, place, person, and property, as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint. A city or town ordinance may be referred to by its title and section, and the number thereof.

History: Earlier acts relating to proceedings in justice court differed materially from the law since 1895. They are the following: Secs. 307-341, pp. 263-267, Bannack Stat.; superseded by Secs. 468-

526, pp. 262-267, Cod. Stat. 1871; ap. Secs. 468-526, 3d Div. Rev. Stat. 1879; re-en. Secs. 474-530, 3d Div. Comp. Stat. 1887.

This section en. Sec. 2680, Pen. C. 1895; re-en. Sec. 9584, Rev. C. 1907; re-en. Sec.

12302, R. C. M. 1921. Cal. Pen. C. Sec. 1426.

Limited Jurisdiction

Police courts, like justices' courts, are courts of limited jurisdiction and have only such authority as is expressly conferred upon them. *State ex rel. Marquette v. Police Court*, 86 M 297, 308, 283 P 430.

No Right of Appeal by Cities

Defendant, charged with wrongfully obstructing an alley, was proceeded against under the statute governing criminal procedure in police courts (this section through section 94-100-46), convicted and appealed to the district court, where the complaint was dismissed. Held, on appeal by the city that, the statute not granting the right of appeal to cities in criminal causes tried in justice or police courts, the appeal did not lie. *City of Miles City v. Drum*, 60 M 452, 199 P 719.

Operation and Effect

In a criminal proceeding, it is sufficient to plead a city ordinance by reference to its title, section and subdivision of section. *City of Philipsburg v. Weinstein*, 21 M 146, 53 P 272.

For an instance of a complaint charging a sale of liquor, in violation of the local option law, and meeting all the requirements of the statute, see *State v. O'Brien*, 35 M 482, 494, 90 P 514.

The nature of an action for the violation of a city ordinance, whether civil or criminal, must be determined by the relief sought in the proceeding, without regard to the question whether some other proceeding may or may not be brought under the state statutes. *State ex rel. Marquette v. Police Court*, 86 M 297, 308, 283 P 430.

94-100-2. (12303) When warrant of arrest must issue—form. If the justice of the peace, or police judge, is satisfied therefrom that the offense complained of has been committed, he must issue a warrant of arrest which must be substantially in the following form:

"County of

"The State of Montana to any sheriff, constable, marshal or policeman in this state:

"Complaint upon oath having been this day made before me (justice of the peace or police judge, as the case may be) by C D, that the offense of (designating it generally) has been committed, and accusing E F thereof; you are hereby commanded forthwith to arrest the above named E F and bring him before me forthwith, at (naming the place).

"Witness my hand and seal at, this day of, A. D.

"A B, Justice of the Peace or Judge."

Id. Held, that a proceeding looking to the imposition of a fine for the violation of a city ordinance is one for a "public offense" within the meaning of section 94-4904, giving the police magistrate power to issue a warrant for the arrest of a person charged with a public offense, and of this section, providing the procedure in an action before the police court for a public offense, justifying the issuance of a warrant of arrest under the following section, 94-100-2.

Where Issues Narrowed from General Allegations to Specific Averments

Where general allegations in a complaint are followed by specific averments, the issues are narrowed to those embraced within the particular allegations. *State v. Schnell*, 107 M 579, 585, 88 P 2d 19.

Where Offense Erroneously Named, Not Fatal to Pleading

The general rule is that when the facts, acts and circumstances are set forth with sufficient certainty to constitute an offense, it is not a fatal defect that the complaint gives the offense an erroneous name; the name of the crime is controlled by the specific acts charged, and an erroneous name of the charge does not vitiate the complaint. *State v. Schnell*, 107 M 579, 585, 88 P 2d 19.

References

Cited or applied as section 2680, Penal Code, in *In re Graye*, 36 M 394; 400, 93 P 66.

Criminal Law 211 (1).

22 C.J.S. Criminal Law §§ 307, 311.

31 Am. Jur. 742, Justices of the Peace, § 60.

Power of justice of peace to take affidavit as basis for warrant of arrest. 16 ALR 923.

History: En. Sec. 2681, Pen. C. 1895; re-en. Sec. 9585, Rev. C. 1907; re-en. Sec. 12303, R. C. M. 1921. Cal. Pen. C. Sec. 1427.

Operation and Effect

It is the duty of a justice of the peace, when he is satisfied upon the complaint of any citizen that an offense has been committed, to issue a warrant of arrest and to have the offender brought before him for trial or examination, as the case may be. State v. O'Brien, 35 M 482, 494, 90 P 514.

Held, that a proceeding looking to the imposition of a fine for the violation of a city ordinance is one for a "public offense" within the meaning of section 94-

4904, giving the police magistrate power to issue a warrant for the arrest of a person charged with a public offense, and of section 94-100-1, providing the procedure in an action before the police court for a public offense, justifying the issuance of a warrant of arrest under this section. State ex rel. Marquette v. Police Court, 86 M 297, 308, 283 P 430.

References

City of Miles City v. Drum, 60 M 451, 452, 199 P 719.

Criminal Law 218 (1).

22 C.J.S. Criminal Law § 321.

94-100-3. (12304) Minutes, how kept. A docket must be kept by the justice of the peace, or police judge, in which must be entered each action, and the proceedings of the court therein.

History: En. Sec. 2682, Pen. C. 1895; re-en. Sec. 9586, Rev. C. 1907; re-en. Sec. 12304, R. C. M. 1921. Cal. Pen. C. Sec. 1428.

Operation and Effect

In the absence of specific statutory provision on the subject, the original files,

together with a copy of the docket minutes, constitute the record on appeal, in a criminal cause, from a justice of the peace to the district court. In re Graye, 36 M 394, 397, 93 P 66.

Criminal Law 254.

22 C.J.S. Criminal Law § 379.

94-100-4. (12305) Plea, how put in. The defendant may make the same plea as upon indictment or information. His plea must be oral, and entered in the minutes. If the defendant plead guilty, the court may, before entering such plea or pronouncing judgment, examine witnesses to ascertain the gravity of the offense committed; and if it appear to the court that a higher offense has been committed than the offense charged in the complaint, the court may order the defendant to be committed or admitted to bail, to answer any information which may be filed by the county attorney.

History: En. Sec. 2683, Pen. C. 1895; re-en. Sec. 9587, Rev. C. 1907; re-en. Sec. 12305, R. C. M. 1921. Cal. Pen. C. Sec. 1429.

Code, in State v. O'Brien, 35 M 482, 494, 90 P 514.

Criminal Law 252 (5).

22 C.J.S. Criminal Law § 378.

References

Cited or applied as section 2683, Penal

94-100-5. (12306) Issue, how tried. Upon a plea other than guilty, if the parties waive a trial by jury, and an adjournment or change of place of trial is not granted, the court must proceed to try the case.

History: En. Sec. 2684, Pen. C. 1895; re-en. Sec. 9588, Rev. C. 1907; re-en. Sec. 12306, R. C. M. 1921. Cal. Pen. C. Sec. 1430.

94-100-6. (12307) Change of venue, when granted. If the action or proceeding is in a justice's court, a change of the place of trial may be had at any time before the trial commences—

1. When it appears from the affidavit of the defendant that he has good reason to believe, and does believe, that he cannot have a fair and impartial trial before the justice about to try the case, by reason of the

prejudice or bias of such justice, the cause must be transferred to another justice of the same or adjoining township;

2. When it appears from affidavit that the defendant cannot have a fair and impartial trial, by reason of the prejudice of the citizens of the township, the cause must be transferred to a justice of the township where the same prejudice does not exist. In each case the defendant must state the facts upon which his belief is founded.

History: En. Sec. 2685, Pen. C. 1895; re-en. Sec. 9589, Rev. C. 1907; re-en. Sec. 12307, R. C. M. 1921. Cal. Pen. C. Sec. 1431.

Operation and Effect

It seems that a police judge may grant a change of the place of trial of a criminal cause pending before him upon a motion, supported by a proper showing, either for bias or prejudice of such judge, or prejudice in the citizens of the township. In re Graye, 36 M 394, 397, 93 P 66.

A change of venue cannot be had from a justice of the peace court of one county to a justice of the peace court of another county, and, by creating but a single township in a given county, the commissioners of that county could nullify the provisions of this section. State ex rel. Gillett v. Cronin, 41 M 293, 295, 109 P 144.

Criminal Law 125, 126 (1).

22 C.J.S. Criminal Law §§ 195, 196.

14 Am. Jur. 929, Criminal Law, §§ 232 et seq.; 56 Am. Jur. 47, Venue, §§ 42 et seq.

Jurisdiction or power of courts of respective districts as to subsequent proceedings, as affected by dismissal, nolle prosequi or mistrial after change of venue in criminal case. 18 ALR 714.

Power as to withdrawal or modification of order granting change of venue. 59 ALR 362.

State's right to change of venue in criminal case. 80 ALR 355.

Right of state to certiorari to compel change of venue in criminal case. 109 ALR 797.

Interlocutory order of one judge concerning change of venue as binding on another judge in same case. 132 ALR 72.

94-100-7. (12308) Papers and proceedings to be transferred. When a change of the place of trial is ordered, the justice must transmit to the justice before whom the trial is to be had all the original papers in the cause, with a certified copy of the minutes of his proceedings; and upon receipt thereof, the justice to whom they are delivered must proceed with the trial in the same manner as if the proceeding or action had been originally commenced in his court.

History: En. Sec. 2686, Pen. C. 1895; re-en. Sec. 9590, Rev. C. 1907; re-en. Sec. 12308, R. C. M. 1921. Cal. Pen. C. Sec. 1432.

Criminal Law 141.

22 C.J.S. Criminal Law § 216.

94-100-8. (12309) True name of defendant. The defendant, if he declare that the name given him in the complaint is not his true name, must make known what his name is, and if he fail to do so, he shall not afterward be allowed to raise the objection that he was not complained of under his true name.

History: En. Sec. 476, p. 262, Cod. Stat. 1871; re-en. Sec. 476, 3d Div. Rev. Stat. 1879; re-en. Sec. 482, 3d Div. Comp. Stat. 1887; re-en. Sec. 2687, Pen. C. 1895; re-en. Sec. 9591, Rev. C. 1907; re-en. Sec. 12309, R. C. M. 1921.

Indictment and Information 196 (6).

42 C.J.S. Indictments and Informations §§ 306, 334.

94-100-9. (12310) Same. If he gives his true name, the court must make a minute of the same, and thereafter the case must proceed in that name.

History: En. Sec. 477, p. 262, Cod. Stat. 1871; re-en. Sec. 477, 3d Div. Rev. Stat.

1879; re-en. Sec. 483, 3d Div. Comp. Stat. 1887; re-en. Sec. 2688, Pen. C. 1895; re-en.

Sec. 9592, Rev. C. 1907; re-en. Sec. 12310,
R. C. M. 1921.

Criminal Law 252 (1).
22 C.J.S. Criminal Law § 374.

94-100-10. (12311) New complaint. If a demurrer to any complaint is sustained for any other cause than that of a want of jurisdiction in the court to hear the offense charged, a new complaint may be made against the defendant.

History: En. Sec. 479, p. 262, Cod. Stat. 1887; re-en. Sec. 2689, Pen. C. 1895; Stat. 1871; re-en. Sec. 479, 3d Div. Rev. re-en. Sec. 9593, Rev. C. 1907; re-en. Sec. Stat. 1879; re-en. Sec. 485, 3d Div. Comp. 12311, R. C. M. 1921.

94-100-11. (12312) Jury. The defendant is entitled to a jury of six qualified persons, but may consent to a less number.

History: En. Sec. 2690, Pen. C. 1895; Jury 4.
re-en. Sec. 9594, Rev. C. 1907; re-en. Sec. 50 C.J.S. Juries § 7.
12312, R. C. M. 1921. 31 Am. Jur. 575, Jury, § 28.

94-100-12. (12313) Jury trial, how waived. A trial by jury may be waived by the consent of both parties expressed in open court and entered in the docket. The formation of the jury is provided for in sections 93-1601 to 93-1603 and 93-1808 and 93-1809.

History: En. Sec. 2691, Pen. C. 1895; Jury 29 (3).
re-en. Sec. 9595, Rev. C. 1907; re-en. Sec. 50 C.J.S. Juries § 86.
12313, R. C. M. 1921. Cal. Pen. C. Sec. 1435.

94-100-13. (12314) Postponement. Before the commencement of a trial in any of the courts mentioned in this chapter, either party may, upon good cause shown, have a reasonable postponement thereof.

History: En. Sec. 2692, Pen. C. 1895; 31 Am. Jur. 749, Justices of the Peace,
re-en. Sec. 9596, Rev. C. 1907; re-en. Sec. § 77.
12314, R. C. M. 1921. Cal. Pen. C. Sec. 1433.

94-100-14. (12315) Verbal notice to witness. When a trial under the provisions of this chapter is continued by the court, it is not necessary for the court to summon any witnesses who may be present at the continuance, but the court must verbally notify such witnesses, as either party may require, to attend before it, to testify in the cause, on the day set for trial, which verbal notice is as valid as a subpoena.

History: En. Sec. 2693, Pen. C. 1895;
re-en. Sec. 9597, Rev. C. 1907; re-en. Sec.
12315, R. C. M. 1921.

94-100-15. (12316) Defendant to be present. The defendant must be personally present before the trial can proceed.

History: En. Sec. 472, p. 262, Cod. Stat. 1887; re-en. Sec. 2694, Pen. C. 1895; re-en. Stat. 1871; re-en. Sec. 472, 3d Div. Rev. Stat. Sec. 9598, Rev. C. 1907; re-en. Sec. 12316, 1879; re-en. Sec. 478, 3d Div. Comp. Stat. R. C. M. 1921. Cal. Pen. C. Sec. 1434.

94-100-16. (12317) Challenges. The same challenges may be taken by either party to the panel of jurors, or to any individual juror, as on the trial of an indictment or information, for a misdemeanor; but the challenge must in all cases be tried by the court.

History: En. Sec. 2695, Pen. C. 1895; 12317, R. C. M. 1921. Cal. Pen. C. Sec.
re-en. Sec. 9599, Rev. C. 1907; re-en. Sec. 1436.

Jury—115, 125, 135.

50 C.J.S. Juries §§ 247, 261, 268, 271, 280.
31 Am. Jur. 631, Jury, §§ 100 et seq.

Number of peremptory challenges allowable where two or more parties are on same side. 136 ALR 417.

94-100-17. (12318) Oath. The court must administer to the jury the following oath:

“You do swear that you will well and truly try the issue between the state of Montana and A B, the defendant, and a true verdict render according to the evidence.”

History: En. Sec. 2696, Pen. C. 1895;
re-en. Sec. 9600, Rev. C. 1907; re-en. Sec.
12318, R. C. M. 1921. Cal. Pen. C. Sec.
1437.

Jury—148 (4).
50 C.J.S. Juries § 296.

94-100-18. (12319) Trial, how conducted. After the jury are sworn, they must sit together and hear the proofs and allegations of the parties, which must be delivered in public, and in the presence of the defendant. The jury must not separate during the trial except by consent of the parties.

History: En. Sec. 2697, Pen. C. 1895;
re-en. Sec. 9601, Rev. C. 1907; re-en. Sec.
12319, R. C. M. 1921. Cal. Pen. C. Sec.
1438.

31 Am. Jur. 749, Justices of the Peace,
§§ 75 et seq.

94-100-19. (12320) Court decides questions of law. The court must decide all questions of law which may arise in the course of the trial, but can give no charge with respect to matters of fact.

History: En. Sec. 2698, Pen. C. 1895;
re-en. Sec. 9602, Rev. C. 1907; re-en. Sec.
12320, R. C. M. 1921. Cal. Pen. C. Sec.
1439.

tive form of an ancient legal maxim which has been enacted in many statutes, and has been deemed so vital to the rights and liberties of the people that it has been engrafted upon the constitutions of states. State v. Sullivan, 9 M 174, 177, 22 P 1088.

Operation and Effect

This section is the statement in legisla-

94-100-20. (12321) Jury may decide in court or retire. After hearing the proofs and allegations, the jury may decide in court, or may retire for consideration. If they do not immediately agree, an officer must be sworn to the following effect: “You do swear that you will keep this jury together in some quiet and convenient place; that you will not permit any person to speak to them, nor to speak to them yourself, unless by order of the court, or to ask them whether they have agreed upon a verdict; and that you will return them into court when they have so agreed, or when ordered by the court.”

History: En. Sec. 2699, Pen. C. 1895;
re-en. Sec. 9603, Rev. C. 1907; re-en. Sec.

12321, R. C. M. 1921. Cal. Pen. C. Sec.
1440.

94-100-21. (12322) Verdict, how delivered and entered. The verdict of the jury must in all cases be general. When the jury have agreed on their verdict, they must deliver it publicly to the court, who must enter, or cause it to be entered, in the minutes.

History: En. Sec. 2700, Pen. C. 1895;
re-en. Sec. 9604, Rev. C. 1907; re-en. Sec.

12322, R. C. M. 1921. Cal. Pen. C. Sec.
1441.

94-100-22. (12323) Verdict when several defendants are tried. When several defendants are tried together, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they

do agree, on which a judgment must be entered accordingly, and the case as to the rest may be tried by another jury.

History: En. Sec. 490, p. 263, Cod. Stat. 1887; re-en. Sec. 2701, Pen. C. 1895; re-en. 1871; re-en. Sec. 490, 3d Div. Rev. Stat. Sec. 9605, Rev. C. 1907; re-en. Sec. 12323, 1879; re-en. Sec. 496, 3d Div. Comp. Stat. R. C. M. 1921. Cal. Pen. C. Sec. 1442.

94-100-23. (12324) Jury, when to be discharged without verdict. The jury cannot be discharged after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless for good cause the court sooner discharges them.

History: En. Sec. 2702, Pen. C. 1895; 12324, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9606, Rev. C. 1907; re-en. Sec. 1443.

94-100-24. (12325) If discharged, defendant may be tried again. If the jury is discharged, as provided in the last section, the court may proceed again to the trial, in the same manner as upon the first trial, and so on, until a verdict is rendered.

History: En. Sec. 2703, Pen. C. 1895; 12325, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9607, Rev. C. 1907; re-en. Sec. 1444.

94-100-25. (12326) Proceedings on plea of guilty or on conviction. When the defendant pleads guilty, or is convicted, either by the court or by a jury, the court must render judgment thereon of fine and imprisonment, or both, as the case may be. The judgment must be executed by the sheriff, constable, marshal or policeman of the jurisdiction in which the conviction was had.

History: En. Sec. 2704, Pen. C. 1895; Criminal Law § 252 (1).
re-en. Sec. 9608, Rev. C. 1907; re-en. Sec. 22 C.J.S. Criminal Law § 374.
12326, R. C. M. 1921. Cal. Pen. C. Sec. 1445.

94-100-26. (12327) Jury may fix punishment. When the punishment provided for any offense is in the alternative, the jury may fix the same; any neglect on their part to do so will not prevent the court from fixing it.

History: En. Sec. 492, p. 263, Cod. Stat. 1887; re-en. Sec. 2705, Pen. C. 1895; re-en. 1871; re-en. Sec. 492, 3d Div. Rev. Stat. Sec. 9609, Rev. C. 1907; re-en. Sec. 12327, 1879; re-en. Sec. 498, 3d Div. Comp. Stat. R. C. M. 1921.

94-100-27. (12328) Justice may modify same. If the justice deem any penalty fixed by the jury erroneous, he has the right to modify the same.

History: En. Sec. 493, p. 263, Cod. Stat. 1887; re-en. Sec. 2706, Pen. C. 1895; re-en. 1871; re-en. Sec. 493, 3d Div. Rev. Stat. Sec. 9610, Rev. C. 1907; re-en. Sec. 12328, 1879; re-en. Sec. 499, 3d Div. Comp. Stat. R. C. M. 1921.

94-100-28. (12329) Fine or imprisonment. A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every two dollars of the fine.

History: En. Sec. 2707, Pen. C. 1895; described in a judgment rendered in a justice
re-en. Sec. 9611, Rev. C. 1907; re-en. Sec. court, such imprisonment operates ipso
12329, R. C. M. 1921. Cal. Pen. C. Sec. facto to satisfy and discharge the judg-
1446. ment, and the justice is without authority
to retain money of the prisoner collected
by executor under the provisions of sec-
tions 94-7817 and 94-7818. Petelin v. Ken-
nedy, 29 M 466, 75 P 82.

Operation and Effect

Where a defendant has been imprisoned under this section for the full period pre-

References

Cited or applied as section 2707, Penal Code, in *State ex rel. Hodgdon v. District Court*, 33 M 119, 120, 82 P 663.

Criminal Law 258 (3).

22 C.J.S. Criminal Law § 386.

94-100-29. (12330) Defendant on acquittal to be discharged—prosecutor to pay costs, when. When the defendant is acquitted, either by the court or by the jury, he must be immediately discharged; and if the court certify in the minutes that the prosecution was malicious or without probable cause, it may order the prosecutor to pay the costs of the action, or to give satisfactory security by a written undertaking, with one or more sureties, to pay the same within thirty days after the trial.

History: En. Sec. 2708, Pen. C. 1895; re-en. Sec. 9612, Rev. C. 1907; re-en. Sec. 12330, R. C. M. 1921. Cal. Pen. C. Sec. 1447.

"Probable Cause" Various Defined

"Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of." "It is not essential to probable cause for an arrest that the accuser believe that he has sufficient evidence to procure a conviction." "Probable cause does not depend on the actual state of the case in

point of fact, for there may be probable cause for commencing a criminal prosecution against a party, although subsequent developments may show his absolute innocence." (Not citing this section.) *State ex rel. Wong You v. District Court*, 106 M 347, 352, 78 P 2d 353.

References

Cited or applied as section 9612, Revised Codes, in *Griggs v. Glass*, 58 M 476, 481, 193 P 564.

Costs 290; Criminal Law 257.

20 C.J.S. Costs § 437; 22 C.J.S. Criminal Law § 382.

94-100-30. (12331) Prosecutor to pay costs. If the prosecutor does not pay the costs, or give security therefor, the court may enter judgment against him for the amount thereof, which may be enforced in all respects in the same manner as a judgment rendered in a civil action. An appeal may be taken as in other cases in a civil action.

History: En. Sec. 2709, Pen. C. 1895; re-en. Sec. 9613, Rev. C. 1907; re-en. Sec. 12331, R. C. M. 1921. Cal. Pen. C. Sec. 1448.

Codes, in *Griggs v. Glass*, 58 M 476, 481, 193 P 564.

Costs 316.

20 C.J.S. Costs § 447.

References

Cited or applied as section 9613, Revised

94-100-31. (12332) Judgment. After a plea or verdict of guilty, or after a verdict against the defendant, on a plea of a former conviction or acquittal, the court must appoint a time for rendering judgment, which must not be more than two days nor less than six hours after the verdict is rendered, unless the defendant waive the postponement. If postponed, the court may hold the defendant to bail to appear for judgment. A judgment must be entered in the minutes of the court as soon as rendered.

History: En. Sec. 2710, Pen. C. 1895; re-en. Sec. 9614, Rev. C. 1907; re-en. Sec. 12332, R. C. M. 1921. Cal. Pen. C. Sec. 1449.

return of the verdict, to pronounce sentence, without any objection from the defendant, his silence is a waiver of his right to a postponement of judgment. *Hosoda v. Neville*, 45 M 310, 312, 123 P 20.

Operation and Effect

Where a person accused in a justice's court of a misdemeanor is convicted, and the justice immediately proceeds, upon the

References

Cited or applied as section 2710, Penal

Code, in *State v. O'Brien*, 35 M 482, 491,
90 P 514.

Criminal Law 258 (1).
22 C.J.S. Criminal Law § 384.

94-100-32. (12333) How defendant may be discharged. A defendant committed under the provisions of this chapter may be discharged in the same manner as if he had been committed by the district court.

History: En. Sec. 503, p. 264, Cod. Stat. 1871; re-en. Sec. 503, 3d Div. Rev. Stat. 1879; re-en. Sec. 509, 3d Div. Comp. Stat. 1887; re-en. Sec. 2711, Pen. C. 1895; re-en.

Sec. 9615, Rev. C. 1907; re-en. Sec. 12333, R. C. M. 1921.

Criminal Law 259.
22 C.J.S. Criminal Law § 388.

94-100-33. (12334) Defendant may appeal. The defendant may appeal to the district court at any time within ten days after judgment is rendered.

History: En. Sec. 504, p. 264, Cod. Stat. 1871; re-en. Sec. 504, 3d Div. Rev. Stat. 1879; re-en. Sec. 510, 3d Div. Comp. Stat. 1887; re-en. Sec. 2712, Pen. C. 1895; re-en.

Sec. 9616, Rev. C. 1907; re-en. Sec. 12334, R. C. M. 1921.

Criminal Law 260 (3).
22 C.J.S. Criminal Law § 390.

94-100-34. (12335) Notice of appeal. An appeal is taken by the defendant by giving notice in open court of his intention so to do, at the time of the rendition of the verdict or judgment, or by filing with the justice within five days thereafter, a written notice of appeal.

History: En. Sec. 2713, Pen. C. 1895; re-en. Sec. 9617, Rev. C. 1907; re-en. Sec. 12335, R. C. M. 1921.

requirement. *State ex rel. Hodgdon v. District Court*, 33 M 119, 122, 82 P 663.

An appeal may be taken by oral notice at the time of the rendition of the verdict or judgment. In *re Graye*, 36 M 394, 398, 93 P 66.

Operation and Effect

An undertaking on appeal, being purely a statutory regulation, may not be exacted unless the statute specifically makes such

Criminal Law 260 (4).
22 C.J.S. Criminal Law §§ 392, 395.

94-100-35. (12336) Undertaking for fine and costs. When the appeal is from a judgment for fine, the defendant must, within ten days after the rendition of the verdict or judgment, file with the justice an undertaking, with two sufficient sureties, in double the amount of the judgment for fine and costs, to the effect that defendant will pay the same or such part thereof as the district court may direct, or if the appeal is dismissed, that judgment may be entered against said sureties, in the district court therefor. Such undertaking must be approved by the justice and the sureties must justify as provided in this code.

History: En. Sec. 2714, Pen. C. 1895; re-en. Sec. 9618, Rev. C. 1907; re-en. Sec. 12336, R. C. M. 1921.

jail until the fine be paid, is not a judgment for fine only, within the meaning of this section. *State ex rel. Hodgdon v. District Court*, 33 M 119, 120, 82 P 663.

Operation and Effect

A judgment rendered by a justice of the peace, in a case of misdemeanor, imposing a fine, with imprisonment in the county

Criminal Law 260 (6).
22 C.J.S. Criminal Law § 394.

94-100-36. (12337) Judgment against sureties. If on appeal judgment is rendered against the defendant, or if the appeal is dismissed, the court must also render a judgment against the sureties for the amount of fine and costs.

History: En. Sec. 2715, Pen. C. 1895; re-en. Sec. 9619, Rev. C. 1907; re-en. Sec. 12337, R. C. M. 1921.

References

Cited or applied as section 2715, Penal Code, in State ex rel. Hodgdon v. District Court, 33 M 119, 120, 82 P 663.

94-100-37. (12338) Undertaking on judgment of imprisonment. When the appeal is from a judgment of imprisonment the defendant may be admitted to bail pending the appeal by giving an undertaking as provided in subdivision 2 of section 94-8306, in a sum, to be approved by the court, not exceeding seven hundred dollars, to the effect that defendant will appear and surrender himself in execution of any judgment in said district court that may be rendered therein against him, and obey all orders of the district court, and pay all costs that may be awarded against defendant, or if said appeal be dismissed.

History: En. Sec. 2716, Pen. C. 1895; re-en. Sec. 9620, Rev. C. 1907; re-en. Sec. 12338, R. C. M. 1921.

Code, in State ex rel. Hodgdon v. District Court, 33 M 119, 121, 82 P 663.

References

Cited or applied as section 2716, Penal

Bail \Leftrightarrow 64.

8 C.J.S. Bail §§ 65-67.

94-100-38. (12339) Trial anew. All cases on appeal from justices' or police courts must be tried anew in the district court.

History: En. Sec. 510, p. 265, Cod. Stat. 1871; re-en. Sec. 510, 3d Div. Rev. Stat. 1879; re-en. Sec. 516, 3d Div. Comp. Stat. 1887; amd. Sec. 2717, Pen. C. 1895; re-en. Sec. 9621, Rev. C. 1907; re-en. Sec. 12339, R. C. M. 1921.

Operation and Effect

Since the district court does not, on appeal from a justice's court, sit as a court of review, but tries the case de novo, any irregularities attending the rendition of the judgment in a case in which the justice had jurisdiction of the offense charged and of the defendant are waived by taking the appeal. State v. O'Brien, 35 M 482, 491, 90 P 514.

The original files, together with a copy of the docket minutes, may be regarded as constituting the record on appeal from a justice of the peace to the district court. In re Graye, 36 M 394, 397, 93 P 66.

Id. A party cannot, under the guise of an application for a trial de novo, insist that irregularities, to which he made no objection, shall be taken note of, or that the judgment, which is abrogated by the appeal, be reversed on account of them. It is therefore immaterial, on the trial of

the case appealed, whether the justice lost jurisdiction by conducting the trial in part on a legal holiday, or failed to comply with the statute in giving judgment or pronouncing sentence.

The result of an appeal from a judgment of a justice of the peace, in a prosecution for misdemeanor, is to abrogate that judgment and to hold defendant under the original warrant of arrest for trial de novo in the district court, and the defendant cannot complain, on habeas corpus, of any irregularity committed by the justice in rendering judgment. Hosoda v. Neville, 45 M 310, 313, 123 P 20.

On appeal from a justice's court in a misdemeanor case, the cause must be tried de novo in the district court on the papers and files in the former, unless the latter court allows other or amended pleadings, and each party has the benefit of all legal objections made in the justice's court. State v. Benson, 91 M 109, 5 P 2d 1045.

Criminal Law \Leftrightarrow 260 (13).

22 C.J.S. Criminal Law § 403.

2 Am. Jur. 934, Appeal and Error, §§ 140 et seq.; 3 Am. Jur. 172, Appeal and Error, §§ 482 et seq.

94-100-39. (12340) Defendant must be discharged on acquittal. If judgment of acquittal is given, or judgment imposing a fine only, without imprisonment for nonpayment, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given.

History: En. Sec. 2718, Pen. C. 1895; re-en. Sec. 9622, Rev. C. 1907; re-en. Sec. 12340, R. C. M. 1921. Cal. Pen. C. Sec. 1454.

Operation and Effect

It is apparent from this section and the next section that the legislature recognized a distinction between a judgment for fine,

and one for fine with imprisonment until the fine be paid. State ex rel. Hodgdon v. District Court, 33 M 119, 120, 82 P 663.

Criminal Law 257.

22 C.J.S. Criminal Law § 382.

94-100-40. (12341) Judgment of imprisonment or fine, how executed. When a judgment of imprisonment is entered, a certified copy thereof must be delivered to the sheriff or other officer, which is a sufficient warrant for its execution. When a judgment is entered imposing a fine, or ordering the defendant to be imprisoned until the fine is paid, he must be held in custody during the time specified in the judgment, unless the fine is sooner paid.

History: En. Sec. 2719, Pen. C. 1895; re-en. Sec. 9623, Rev. C. 1907; re-en. Sec. 12341, R. C. M. 1921. Cal. Pen. C. Secs. 1455, 1456.

a judgment is entered imposing a fine, or ordering the defendant to be imprisoned," etc., should be "and." State ex rel. Hodgdon v. District Court, 33 M 119, 121, 82 P 663.

Operation and Effect

It is apparent that the word "or," as used in this section in the sentence, "when

Criminal Law 259.

22 C.J.S. Criminal Law § 388.

94-100-41. (12342) Defendant may be admitted to bail at any time. The defendant, at any time after his arrest, and before conviction, may be admitted to bail. The provisions of this code relative to bail are applicable to bail in justices' or police courts.

History: En. Sec. 2720, Pen. C. 1895; re-en. Sec. 9624, Rev. C. 1907; re-en. Sec. 12342, R. C. M. 1921. Cal. Pen. C. Sec. 1458.

Bail 42.

8 C.J.S. Bail §§ 34-37.

Mandamus to compel approval of bonds by justice of the peace. 92 ALR 1211.

94-100-42. (12343) Subpoena. The justice or judge of either of the courts mentioned in this chapter may issue subpoenas for witnesses, as provided in section 94-8901, and punish disobedience thereof, as provided in section 94-8907.

History: En. Sec. 2721, Pen. C. 1895; re-en. Sec. 9625, Rev. C. 1907; re-en. Sec.

12343, R. C. M. 1921. Cal. Pen. C. Sec. 1459.

94-100-43. (12344) Entitling affidavits. The provisions of section 94-6433 in respect to entitling affidavits are applicable to proceedings in the courts mentioned in this chapter.

History: En. Sec. 2722, Pen. C. 1895; re-en. Sec. 9626, Rev. C. 1907; re-en. Sec. 12344, R. C. M. 1921. Cal. Pen. C. Sec. 1460.

Affidavits 7.

2 C.J.S. Affidavits § 13.

94-100-44. (12345) Police courts defined. The term "police court," as used in this chapter, includes police magistrates and police courts.

History: En. Sec. 2723, Pen. C. 1895; re-en. Sec. 9627, Rev. C. 1907; re-en. Sec. 12345, R. C. M. 1921. Cal. Pen. C. Sec. 1461.

Criminal Law 90 (1).

22 C.J.S. Criminal Law § 125.

94-100-45. (12346) Officer must pay fines to justice. Any officer charged with the collection of fines, under the provisions of this chapter, must return the execution to the justice, within thirty days from its delivery to him, and pay over to the justice the money collected therefrom, deducting his fees for the collection.

History: En. Sec. 2724, Pen. C. 1895; re-en. Sec. 9628, Rev. C. 1907; re-en. Sec. 12346, R. C. M. 1921.

Fines 6.

36 C.J.S. Fines § 9.

94-100-46. (12347) Justices must pay fines to treasurer. All fines imposed and collected by any court, under the provisions of this chapter, must be paid by him to the treasurer of the county, city, or town, according as the offense is prosecuted in a justice or police court, within thirty days after the receipt of the same, and the justice or police judge must take duplicate receipts therefor, one of which he must deposit with the county, city, or town clerk, as the case may be.

History: En. Sec. 2725, Pen. C. 1895; Fines \Rightarrow 20.
 re-en. Sec. 9629, Rev. C. 1907; re-en. Sec. 36 C.J.S. Fines § 19.
 12347, R. C. M. 1921.

CHAPTER 101

THE WRIT OF HABEAS CORPUS

Section 94-101-1.	Who may prosecute writ.
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94-101-1. (12348) Who may prosecute writ. Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint.

History: The habeas corpus act was enacted in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section was Sec. 9630, Rev. C. 1907; re-en. Sec. 12348, R. C. M. 1921. Cal. Pen. C. Sec. 1473.

Insufficient Commitment to Jail

Where a justice of the peace upon adjudging one guilty of contempt for dis-

obeying a subpoena imposed a fine of \$100 and upon refusal of payment committed him to jail until payment be made, but thereafter accepted a cash bond in lieu of fine and imprisonment pending final disposition of a certiorari proceeding and appeal to supreme court the objection that the commitment was insufficient under section 94-100-40 would not lie since if the sheriff should presume to hold contemnor thereunder the proper remedy would be habeas corpus. *State ex rel. Mereer v. Woods*, 116 M 533, 542, 155 P 2d 197.

Operation and Effect

Habeas corpus is not a special proceeding of a criminal nature. *State ex rel. Brandegee v. Clements*, 52 M 57, 59, 155 P 271; see also *Newell v. Newell*, 13 M 302, 305, 34 P 28; *State ex rel. Jackson v. Kennie*, 24 M 45, 60 P 589, and *State ex rel. Hepner v. District Court*, 40 M 17, 104 P 872.

The purpose of a writ of habeas corpus is to determine the legality or illegality of the restraint alleged to be exercised; it is available only to persons unlawfully imprisoned or restrained of their liberty, and is independent of the legal proceeding under which the detention is sought to be justified. *August v. Burns*, 79 M 198, 213, 255 P 737.

Id. While a proceeding in habeas corpus involving the custody of a child is civil in its nature and the decision of the court awarding its custody is final, except for abuse of discretion, its decision is res adjudicata only as to those matters properly determined by it on the merits.

Id. While the welfare of a child in the matter of its custody is of paramount interest, neither such interest nor the child's wish will justify a court in denying it its custody to the surviving parent, in the absence of a showing of unfitness or inability to support the child, and turning it over to a stranger.

References

Cited or applied as section 2740, Penal Code, in *State ex rel. Jackson v. Kennie*, 24 M 45, 49, 60 P 589; *State ex rel. White-side v. District Court*, 24 M 539, 553, 63 P 395; *State ex rel. Murray v. District Court*, 35 M 504, 506, 90 P 513; *State v. District Court*, 61 M 558, 567, 202 P 756

Habeas Corpus—1.

39 C.J.S. Habeas Corpus §§ 1, 4.

25 Am. Jur., Habeas Corpus, p. 150, §§ 10 et seq.; p. 159, §§ 26 et seq.

Right of one detained pursuant to quarantine to habeas corpus. 2 ALR 1542.

Perjury in verifying pleadings. 7 ALR 1283.

Right of one at large on bail to writ of habeas corpus. 14 ALR 344.

Habeas corpus as remedy for infringement of right of accused to communicate with attorney. 23 ALR 1385.

Habeas corpus to test constitutionality of ordinance under which petitioner is held. 32 ALR 1054.

Right to discharge on ground that prosecution was barred by limitations where defendant had pleaded guilty after statute had run. 37 ALR 1116.

Habeas corpus in case of sentence which is excessive because imposing both fine and imprisonment. 49 ALR 494.

Power to grant writ of habeas corpus pending appeal from conviction. 52 ALR 876.

Habeas corpus as remedy for exclusion of eligible class or classes of persons from jury list. 52 ALR 927.

Habeas corpus to test the sufficiency of indictment or information as regards the offense sought to be charged. 57 ALR 85.

Habeas corpus as remedy for delay in bringing accused to trial or to retrial after reversal. 58 ALR 1512.

Discharge on habeas corpus in federal court from custody under process of state court for acts done under federal authority. 65 ALR 733.

Statutory remedy as exclusive of remedy by habeas corpus otherwise available. 73 ALR 567.

Illegal or erroneous sentence as ground for habeas corpus. 76 ALR 468.

Power of court in habeas corpus proceedings relating to custody of child to adjudicate amount which shall be paid for support of child, or to modify agreement in that regard. 116 ALR 699.

Habeas corpus as remedy in case of insanity of one convicted of crime. 121 ALR 270.

Overruling of plea of former jeopardy as reviewable on habeas corpus. 122 ALR 1443.

Disqualification of judge who presided at trial or of juror as ground of habeas corpus. 124 ALR 1079.

Habeas corpus to secure release of one restrained of his liberty under provisions of selective military training and service act. 129 ALR 1186.

Habeas corpus as adequate or inadequate for the purposes of an application for a writ of prohibition against contempt proceedings. 136 ALR 731.

Change of judicial decision as ground of habeas corpus for release of one held upon previous conviction. 136 ALR 1032.

Right of interned alien enemy or prisoner of war to habeas corpus. 137 ALR 1353.

Discharge of minor from military service. 137 ALR 1483.

Relief in habeas corpus for violation of accused's right to assistance of counsel. 146 ALR 369.

Parolee's right to habeas corpus. 148 ALR 1243.

Habeas corpus as remedy where one is convicted upon plea of guilty or after trial, of offense other than one charged in indictment or information. 154 ALR 1135.

Habeas corpus on ground of unlawful

treatment of prisoner lawfully in custody. 155 ALR 145.

Habeas corpus on ground of defective title to office of judge, prosecuting attorney, or other officer participating in petitioner's trial or confinement. 158 ALR 529.

94-101-2. (12349) Application for, how made. Application for the writ is made by petition, signed either by the party for whose relief it is intended, or by some person in his behalf, and must specify—

1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming all the parties, if they are known, or describing them, if they are not known.

2. If the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists.

3. The petition must be verified by the oath or affirmation of the party making the application.

History: This act en. in substance as Secs. 1-36, pp. 360-366, *Bannack Stat.*; re-en. Secs. 1-36, pp. 487-491, *Cod. Stat.* 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section was Sec. 9631, Rev. C. 1907; re-en. Sec. 12349, R. C. M. 1921. Cal. Pen. C. Sec. 1474.

References

Cited or applied as section 2741, Penal Code, in State ex rel. Murray v. District Court, 35 M 504, 506, 90 P 513.

Habeas Corpus ⇨ 53, 57.

39 C.J.S. Habeas Corpus § 80.

25 Am. Jur. 238, Habeas Corpus, §§ 131 et seq.

94-101-3. (12350) By whom issued and before whom returnable. The writ of habeas corpus may be granted—

1. By the supreme court, or any justice thereof, upon petition by or on behalf of any person restrained of his liberty in this state. When so issued it may be made returnable before the court, or any justice thereof, or before any district court or judge thereof.

2. By the district courts or a judge thereof, upon petition by or on behalf of any person restrained of his liberty in their respective counties or districts.

History: This act en. in substance as Secs. 1-36, pp. 360-366, *Bannack Stat.*; re-en. Secs. 1-36, pp. 487-491, *Cod. Stat.* 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section was Sec. 9632, Rev. C. 1907; re-en. Sec. 12350, R. C. M. 1921. Cal. Pen. C. Sec. 1475.

Cross-References

District judge may issue and determine at chambers, secs. 93-802, 93-803.

Supreme court justices may issue, secs. 93-217, 93-801.

References

Cited or applied as section 2742, Penal Code, in State ex rel. Whiteside v. District Court, 24 M 539, 553, 63 P 395; State ex rel. Murray v. District Court, 35 M 504, 506, 90 P 513.

Habeas Corpus ⇨ 44, 46, 65.

39 C.J.S. Habeas Corpus §§ 57, 58, 70, 78, 84.

25 Am. Jur. 238, Habeas Corpus, §§ 131 et seq.

94-101-4. (12351) Writ must be granted without delay. Any court or judge authorized to grant the writ, to whom a petition therefor is presented, must, if it appear that the writ ought to issue, grant the same without delay.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section was Sec. 9633, Rev. C. 1907; re-en. Sec. 12351, R. C. M. 1921. Cal. Pen. C. Sec. 1476.

Habeas Corpus \hookrightarrow 62.
39 C.J.S. Habeas Corpus § 82.

94-101-5. (12352) What to contain. This writ must be directed to the person having custody of or restraining the person on whose behalf the application is made, and must command him to have the body of such person before the court, or judge, before whom the writ is returnable, at a time and place therein specified.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887.

This section amd. Sec. 2745, Pen. C. 1895; re-en. Sec. 9634, Rev. C. 1907; re-en. Sec. 12352, R. C. M. 1921. Cal. Pen. C. Sec. 1477.

94-101-6. (12353) How served. If the writ is directed to the sheriff or other ministerial officer of the court out of which it issues, it must be delivered by the clerk to such officer without delay, as other writs are delivered for service. If it is directed to any other person it must be delivered to the sheriff, and be by him served upon such person by delivering the same to him without delay. If the person to whom the writ is directed cannot be found, or refuses admittance to the officer or person serving or delivering such writ, it may be served or delivered by leaving it at the residence of the person to whom it is directed, or by affixing it to some conspicuous place on the outside either of his dwelling-house, or of the place where the party is confined or under restraint.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9635, Rev. C. 1907; re-en. Sec. 12353, R. C. M. 1921. Cal. Pen. C. Sec. 1478.

Habeas Corpus \hookrightarrow 67.
39 C.J.S. Habeas Corpus § 85.
25 Am. Jur. 240, Habeas Corpus, §§ 134, 135.

94-101-7. (12354) Proceedings upon disobedience to the writ. If the person to whom the writ is directed refuses, after service, to obey the same, the court or judge, upon affidavit, must issue an attachment against such person, directed to the sheriff or coroner, commanding him forthwith to apprehend such person, and bring him immediately before such court or judge; and upon being so brought, he must be committed to the jail of the county until he makes due return to such writ, or is otherwise legally discharged.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9636, Rev. C. 1907; re-en. Sec. 12354, R. C. M. 1921. Cal. Pen. C. Sec. 1479.

Habeas Corpus \hookrightarrow 81.
39 C.J.S. Habeas Corpus § 96.
25 Am. Jur. 244, Habeas Corpus, §§ 145, 146.

Liability for statutory penalty of judge, court, administrative officer or other custodian of person, in connection with habeas corpus proceedings. 84 ALR 807

94-101-8. (12355) Return, what to contain. The person upon whom the writ is served must state in his return, plainly and unequivocally—

1. Whether he has or has not the party in his custody or under his power or restraint.

2. If he has the party in his custody or power, or under his restraint, he must state the authority and cause of such imprisonment or restraint.

3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof must be annexed to the return and the original produced and exhibited to the court or judge on the hearing of such return.

4. If the person upon whom the writ is served had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ of habeas corpus, but has transferred such custody or restraint to another, the return must state particularly to whom, at what time and place, for what cause, and by what authority, such transfer took place.

5. The return must be signed by the person making the same, and, except when such person is a sworn public officer, and makes such return in his official capacity, it must be verified by his oath.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9637, Rev. C. 1907; re-en. Sec. 12355, R. C. M. 1921. Cal. Pen. C. Sec. 1480.

References

Cited or applied as section 1173, Fifth Division Compiled Statutes 1887, in In re McCutcheon, 10 M 115, 25 P 97.

Habeas Corpus ⇨ 75.

39 C.J.S. Habeas Corpus § 89.

25 Am. Jur. 241, Habeas Corpus, §§ 137 et seq.

94-101-9. (12356) Body must be produced, when. The person to whom the writ is directed, if it is served, must bring the body of the party in his custody, or under his restraint, according to the command of the writ, except in the cases specified in the next section.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9638, Rev. C. 1907; re-en. Sec. 12356, R. C. M. 1921. Cal. Pen. C. Sec. 1481.

Habeas Corpus ⇨ 82.

39 C.J.S. Habeas Corpus § 93.

25 Am. Jur. 243, Habeas Corpus, § 144.

94-101-10. (12357) Hearing without production of the body. When, from sickness or infirmity of the person directed to be produced, he cannot, without danger, be brought before the court or judge, the person in whose custody or power he is may state that fact in his return to the writ, verifying the same by affidavit. If the court or judge is satisfied of the truth of such return, and the return to the writ is otherwise sufficient, the court or judge may proceed to decide on such return and to dispose of the matter as if such party had been produced on the writ, or the hearing thereof may be adjourned until such party can be produced.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev.

Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9639, Rev. C. 1907;

re-en. Sec. 12357, R. C. M. 1921, Cal. Pen. C. Sec. 1482.

25 Am. Jur. 245, Habeas Corpus, §§ 147-151.

94-101-11. (12358) Hearing on return. The court or judge before whom the writ is returned must, immediately after the return, proceed to hear and examine the return, and such other matters as may be properly submitted to their hearing and consideration.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9640, Rev. C. 1907; re-en. Sec. 12358, R. C. M. 1921. Cal. Pen. C. Sec. 1483.

Habeas Corpus—90.

39 C.J.S. Habeas Corpus §§ 101, 107.

94-101-12. (12359) Proceedings on the hearing. The party brought before the court or judge, on the return of the writ, may deny or controvert any of the material facts of matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. The court or judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party as the justice of the case may require, and have full power and authority to require and compel the attendance of witnesses, by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9641, Rev. C. 1907; re-en. Sec. 12359, R. C. M. 1921. Cal. Pen. C. Sec. 1484.

Operation and Effect

An order allowing bail in a homicide case is properly made, in the absence of a showing, by the county attorney, that the proof of the defendant's guilt was evident or the presumption thereof great. *State ex rel. Murray v. District Court*, 35 M 504, 507, 90 P 513.

Habeas Corpus—92 (1).

94-101-13. (12360) When court may discharge the party. If no legal cause is shown for such imprisonment or restraint, or for the continuation thereof, such court or judge must discharge such party from the custody or restraint under which he is held.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.;

re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev.

39 C.J.S. Habeas Corpus §§ 29, 30, 31, 40, 49.

Bar of limitations as proper subject of investigation in habeas corpus proceedings for release of one sought to be extradited. 77 ALR 902.

Determination of sufficiency of charge of crime. 81 ALR 552.

Motive or ulterior purpose of officials demanding or granting extradition as proper subject of inquiry on habeas corpus. 94 ALR 1496.

Sanity or insanity or pendency of lunacy proceedings as matters for consideration in extradition proceedings. 114 ALR 693.

Demanding papers in extradition proceedings as making out prima facie case in habeas corpus proceedings that accused was present in demanding state at time of commission of alleged crime or that he is a fugitive. 135 ALR 973.

Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9642, Rev. C. 1907; re-en. Sec. 12360, R. C. M. 1921. Cal. Pen. C. Sec. 1485.

94-101-14. (12361) When to remand party. The court or judge, if the time during which such party may be legally detained in custody has not expired, must remand such party, if it appears that he is detained in custody—

1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or,

2. By virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree.

History: This act en. in substance as Secs. 1-36, pp. 360-366, **Bannack Stat.**; re-en. Secs. 1-36, pp. 487-491, **Cod. Stat.** 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887.

This section amd. Sec. 2753, Pen. C. 1895; re-en. Sec. 9643, Rev. C. 1907; re-en. Sec. 12361, R. C. M. 1921. Cal. Pen. C. Sec. 1486.

Operation and Effect

Where a petitioner for habeas corpus was convicted of murder, and oral judgment was rendered, confining him to prison for twenty-five years, without any record being made, but at a special term, after

References

In re Shaffer, 70 M 609, 613, 227 P 37.

Habeas Corpus ⇨ 111 (1).

39 C.J.S. Habeas Corpus §§ 30, 102.

25 Am. Jur. 249, Habeas Corpus, § 153.

notice to petitioner and his counsel, the minutes were corrected to show the judgment as rendered, and on the judgment thus entered a commitment was issued, the petitioner was legally in custody, for the purposes of the judgment, and not entitled to his discharge. In re Dye, 32 M 132, 136, 79 P 689.

References

Cited or applied as section 2753, Penal Code, in State ex rel. Jackson v. Kennie, 24 M 45, 53, 60 P 589.

Habeas Corpus ⇨ 109.

39 C.J.S. Habeas Corpus § 102.

25 Am. Jur. 250, Habeas Corpus, § 154.

94-101-15. (12362) Grounds of discharge in certain cases. If it appears on the return of the writ that the prisoner is in custody by virtue of process from any court of this state, or judge or officer thereof, such prisoner may be discharged in any of the following cases, subject to the restriction of the last section:

1. When the jurisdiction of such court or officer has been exceeded.

2. When the imprisonment was at first lawful, yet by some act, omission, or event which has taken place afterwards, the party has become entitled to a discharge.

3. When the process is defective in some matter of substance required by law, rendering such process void.

4. When the process, though proper in form, has been issued in a case not allowed by law.

5. When the person having the custody of the prisoner is not the person allowed by law to detain him.

6. Where the process is not authorized by any order, judgment, or decree of any court, nor by any provision of law.

7. Where a party has been committed on a criminal charge without reasonable or probable cause.

History: This act en. in substance as re-en. Secs. 1-36, pp. 487-491, **Cod. Stat.** Secs. 1-36, pp. 360-366, **Bannack Stat.**; 1871; re-en. Secs. 660-695, 5th Div. Rev.

Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9644, Rev. C. 1907; re-en. Sec. 12362, R. C. M. 1921. Cal. Pen. C. Sec. 1487.

Operation and Effect

Where the court imposed a sentence for a term in the state prison for a crime which constituted a misdemeanor, its judgment was void as being in excess of its jurisdiction, and the prisoner was entitled to be discharged on habeas corpus. State v. District Court, 35 M 321, 326, 89 P 63.

On application for writ of habeas corpus, which presents the inquiry whether the trial court had jurisdiction of the subject matter of the prosecution and of the defendant and to render such a judgment as the law authorizes in the particular case, the presumption of jurisdiction is conclusive unless want of it appears on the face of the record, and express recitals of jurisdictional facts cannot be rebutted

by evidence dehors the record. In re Shaffer, 70 M 609, 613, 227 P 37.

On application for writ of habeas corpus the court will not determine whether the indictment upon which complainant was convicted was defective, since the writ cannot be used as a substitute for a demurrer or a motion to quash, its inquiry being confined to a determination of the validity of the process on its face and whether the court had jurisdiction of the offense charged. State ex rel. Boone v. Tullock, 72 M 482, 493, 234 P 277.

References

Cited or applied as section 2754, Penal Code, in State ex rel. Jackson v. Kenzie, 24 M 45, 53, 60 P 589; In re Dye, 32 M 132, 136, 79 P 689; as section 9644, Revised Codes, in In re Jones, 46 M 122, 126, 126 P 929.

Habeas Corpus \Rightarrow 25 (1), 28.

39 C.J.S. Habeas Corpus §§ 13, 16, 22, 26, 29, 39.

94-101-16. (12363) Not to be discharged for defect of form in warrant.

If any person is committed to prison or is in custody of any officer on a criminal charge, by virtue of any warrant of commitment of a justice of the peace, such person must not be discharged on the ground of any mere defect of form in the warrant of commitment.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9645, Rev. C. 1907; re-en. Sec. 12363, R. C. M. 1921. Cal. Pen. C. Sec. 1488.

Operation and Effect

Where a person, after a preliminary examination, is committed for grand lar-

ceny, and, upon his suing out a writ of habeas corpus, on the ground that he is guilty of petit larceny only, it appears from the evidence before the justice that he was guilty at least of petit larceny, and that there was a reasonable basis for the belief that he was guilty of grand larceny, it is the imperative duty of the court to remand him. In re Jones, 46 M 122, 125, 126 P 929.

Habeas Corpus \Rightarrow 30 (3).

39 C.J.S. Habeas Corpus §§ 24, 26, 27.

25 Am. Jur. 172, Habeas Corpus, § 40.

94-101-17. (12364) Proceedings on defective warrant. If it appears to the court or judge, by affidavit or otherwise, or upon the inspection of the process or warrant of commitment and such other papers in the proceedings as may be shown to the court or judge, that the party is guilty of a criminal offense, or ought not to be discharged, such court or judge, although the charge is defective or not substantially set forth in such process or warrant of commitment, must cause the complainant or other necessary witnesses to be subpoenaed to attend at such time as ordered, to testify before the court or judge; and upon the examination he may discharge such prisoner, let him to bail, if the offense be bailable, or recommit him to custody, as may be just and legal.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev.

Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9646, Rev. C. 1907;

re-en. Sec. 12364, R. C. M. 1921, Cal. Pen. C. Sec. 1489.

References

Cited or applied as section 2756, Penal Code, in State ex rel. Murray v. District

Court, 35 M 504, 507, 90 P 513; as section 9646, Revised Codes, in In re Lewis, 51 M 539, 154 P 713.

Habeas Corpus ⇨ 90.

39 C.J.S. Habeas Corpus §§ 101, 107.

94-101-18. (12365) Writ for purpose of bail. When a person is imprisoned or detained in custody on any criminal charge, for want of bail, such person is entitled to a writ of habeas corpus for the purpose of giving bail, upon averring that fact in his petition, without alleging that he is illegally confined.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9647, Rev. C. 1907; re-en. Sec. 12365, R. C. M. 1921. Cal. Pen. C. Sec. 1490.

Habeas Corpus ⇨ 33.

39 C.J.S. Habeas Corpus §§ 34, 35.

25 Am. Jur. 210, Habeas Corpus, §§ 87-90.

94-101-19. (12366) Judge may take bail. Any judge before whom a person who has been committed on a criminal charge may be brought on a writ of habeas corpus, if the same is bailable, may take an undertaking of bail from such person as in other cases, and file the same in the proper court.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9648, Rev. C. 1907; re-en. Sec. 12366, R. C. M. 1921. Cal. Pen. C. Sec. 1491.

Operation and Effect

It is proper to allow bail, in a homicide case, in the absence of a showing, by the county attorney, that the proof of the defendant's guilt is evident or the presumption thereof great. State ex rel. Murray v. District Court, 35 M 504, 507, 90 P 513.

Habeas Corpus ⇨ 110.

39 C.J.S. Habeas Corpus §§ 39, 95, 102.

25 Am. Jur. 245, Habeas Corpus, § 148.

94-101-20. (12367) Judge, when to remand. If a party brought before the court or judge on the return of the writ is not entitled to his discharge, and is not bailed, where such bail is allowable, the court or judge must remand him to custody or place him under the restraint from which he was taken, if the person under whose custody or restraint he was, is legally entitled thereto.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9649, Rev. C. 1907;

re-en. Sec. 12367, R. C. M. 1921. Cal. Pen. C. Sec. 1492.

References

In re Shaffer, 70 M 609, 613, 227 P 37.

Habeas Corpus ⇨ 109.

39 C.J.S. Habeas Corpus § 102.

94-101-21. (12368) Person illegally restrained may be committed to legal custody. In cases where any party is held under illegal restraint or custody, or any other person is entitled to the restraint or custody of such party, the judge or court may order such party to be committed to the restraint or custody of such person as is by law entitled thereto.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.;

re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev.

Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9650, Rev. C. 1907; re-en. Sec. 12368, R. C. M. 1921. Cal. Pen. C. Sec. 1493.

References

Cited or applied as section 9650, Revised Codes, in *In re Lewis*, 51 M 539, 154 P 713.

94-101-22. (12369) Disposition of party pending proceedings on return.

Until judgment is given on the return, the court or judge before whom any party may be brought on such writ, may commit him to the custody of the sheriff of the county, or place him in such care or under such custody as his age or circumstances may require.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9651, Rev. C. 1907; re-en. Sec. 12369, R. C. M. 1921. Cal. Pen. C. Sec. 1494.

Habeas Corpus ⇨ 82.

39 C.J.S. Habeas Corpus § 93.

94-101-23. (12370) Defect of form in the writ immaterial, when. No writ of habeas corpus can be disobeyed for defect of form, if it sufficiently appear therefrom in whose custody or under whose restraint the party imprisoned or restrained is, the officer or person detaining him, and the court or judge before whom he is to be brought.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9652, Rev. C. 1907; re-en. Sec. 12370, R. C. M. 1921. Cal. Pen. C. Sec. 1495.

Habeas Corpus ⇨ 73½.

39 C.J.S. Habeas Corpus § 88.

94-101-24. (12371) Imprisonment after discharge, when permitted. No person who has been discharged by the order of the court or judge upon habeas corpus can be again imprisoned, restrained, or kept in custody for the same cause, except in the following cases:

1. If he has been discharged from custody on a criminal charge, and is afterward committed for the same offense, by legal order or process.
2. If, after a discharge for defect of proof, or for any defect of the process, warrant, or commitment in a criminal case, the prisoner is again arrested on sufficient proof and committed by legal process for the same offense.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9653, Rev. C. 1907; re-en. Sec. 12371, R. C. M. 1921. Cal. Pen. C. Sec. 1496.

Habeas Corpus ⇨ 117 (2).

39 C.J.S. Habeas Corpus §§ 30, 104.

94-101-25. (12372) Warrant may issue instead of writ, in certain cases. When it appears to any court or judge, authorized by law to issue the writ of habeas corpus, that any one is illegally held in custody, confinement, or restraint, and that there is reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before com-

pliance with the writ of habeas corpus can be enforced, such court or judge may cause a warrant to be issued, reciting the facts, and directed to the sheriff, coroner, or constable of the county, commanding such officer to take such person thus held in custody, confinement, or restraint, and forthwith bring him before such court or judge, to be dealt with according to law.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9654, Rev. C. 1907; re-en. Sec. 12372, R. C. M. 1921. Cal. Pen. C. Sec. 1497.

Habeas Corpus \Rightarrow 65.

39 C.J.S. Habeas Corpus § 84.

94-101-26. (12373) Warrant may include person charged with illegal detention. The court or judge may also insert in such warrant a command for the apprehension of the person charged with such illegal detention and restraint.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div.

Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9655, Rev. C. 1907; re-en. Sec. 12373, R. C. M. 1921. Cal. Pen. C. Sec. 1498.

94-101-27. (12374) Warrant, how executed. The officer to whom such warrant is delivered must execute it by bringing the person therein named before the court or judge who directed the issuing of such warrant.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9656, Rev. C. 1907; re-en. Sec. 12374, R. C. M. 1921. Cal. Pen. C. Sec. 1499.

Habeas Corpus \Rightarrow 67.

39 C.J.S. Habeas Corpus § 85.

94-101-28. (12375) Return and hearing on. The person alleged to have such party under illegal confinement or restraint may make return to such warrant, as in case of a writ of habeas corpus, and the same may be denied, and like allegations, proofs, and trial may thereupon be had as upon a return to a writ of habeas corpus.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9657, Rev. C. 1907; re-en. Sec. 12375, R. C. M. 1921. Cal. Pen. C. Sec. 1500.

Habeas Corpus \Rightarrow 73 $\frac{1}{2}$, 90.

39 C.J.S. Habeas Corpus §§ 88, 101, 107.

94-101-29. (12376) Party may be discharged or remanded. If such party is held under illegal restraint or custody, he must be discharged, and if not, he must be restored to the care or custody of the person entitled thereto.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div.

Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9658, Rev. C. 1907; re-en. Sec. 12376, R. C. M. 1921. Cal. Pen. C. Sec. 1501.

References

In re Shaffer, 70 M 609, 613, 227 P 37. Habeas Corpus ⇨ 109, 111 (1).
39 C.J.S. Habeas Corpus §§ 30, 102.

94-101-30. (12377) Writ and process may issue at any time. Any writ or process authorized by this chapter may be issued and served on any day or at any time.

History: First en. as Sec. 2769, Pen. C. 1895; re-en. Sec. 9659, Rev. C. 1907; re-en. Sec. 12377, R. C. M. 1921. Cal. Pen. C. Sec. 1502.

Habeas Corpus ⇨ 67.
39 C.J.S. Habeas Corpus § 85.

94-101-31. (12378) By whom issued and when returnable. All writs, warrants, process, and subpoenas, authorized by the provisions of this chapter, must be issued by the clerk of the court, and, except subpoenas, must be sealed with the seal of such court, and served and returned forthwith, unless the court or judge shall specify a particular time for such return.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9660, Rev. C. 1907; re-en. Sec. 12378, R. C. M. 1921. Cal. Pen. C. Sec. 1503.

Habeas Corpus ⇨ 61.
39 C.J.S. Habeas Corpus § 82.

94-101-32. (12379) Where returnable. All such writs and process, when made returnable before a judge, must be returned before him at the county seat, and there heard and determined.

History: First en. as Sec. 2771, Pen. C. 1895; re-en. Sec. 9661, Rev. C. 1907; re-en. Sec. 12379, R. C. M. 1921. Cal. Pen. C. Sec. 1504.

Habeas Corpus ⇨ 74.
39 C.J.S. Habeas Corpus § 89.

94-101-33. (12380) Damages for failure to issue or obey writ. If any judge, after a proper application is made, refuses to grant an order for a writ of habeas corpus, or if the officer or person to whom such writ may be directed, refuses obedience to the command thereof, he shall forfeit and pay to the person aggrieved a sum not exceeding five thousand dollars, to be recovered by action in any court of competent jurisdiction.

History: This act en. in substance as Secs. 1-36, pp. 360-366, Bannack Stat.; re-en. Secs. 1-36, pp. 487-491, Cod. Stat. 1871; re-en. Secs. 660-695, 5th Div. Rev. Stat. 1879; re-en. Secs. 1164-1199, 5th Div. Comp. Stat. 1887; re-en. Secs. 2740-2772, Pen. C. 1895.

This section en. Sec. 9662, Rev. C. 1907; re-en. Sec. 12380, R. C. M. 1921. Cal. Pen. C. Sec. 1505.

References

Cited or applied as section 2772, Penal Code, in State ex rel. Jackson v. Kennie, 24 M 45, 49, 60 P 589.

Habeas Corpus ⇨ 64, 81.
39 C.J.S. Habeas Corpus §§ 83, 96.

Liability for statutory penalty of judge, court, administrative officer or other custodian of person, in connection with habeas corpus proceeding. 84 ALR 807.

CHAPTER 201

CORONER'S INQUESTS

Section 94-201-1.	Coroner to summon jury to inquire into cause of death.
94-201-2.	Jurors to be sworn.
94-201-3.	Witnesses to be subpoenaed.
94-201-4.	Witness compelled to attend.
94-201-5.	Verdict of jury in writing, what to contain.

- 94-201-6. Testimony in writing and where filed.
- 94-201-7. Exception.
- 94-201-8. Coroner to issue warrant, when.
- 94-201-9. Inquest secret until after arrest.
- 94-201-10. Warrant.
- 94-201-11. Same.
- 94-201-12. Form of warrant.
- 94-201-13. How served.

94-201-1. (12381) Coroner to summon jury to inquire into cause of death. When a coroner is informed that a person has been killed, or has committed suicide, or has died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, he must go to the place where the body is, cause it to be exhumed if it has been interred, and summon not more than nine persons, qualified by law to serve as jurors, to appear before him, forthwith, at the place where the body of the deceased is, to inquire into the cause of the death.

History: Earlier acts relating to coroners' inquests and differing materially from the present law were: Secs. 72-86, pp. 448-450, Cod. Stat. 1871; re-en. Secs. 418-432, 5th Div. Rev. Stat. 1879; re-en. Secs. 869, 883, 5th Div. Comp. Stat. 1887.

This section en. Sec. 2790, Pen. C. 1895; re-en. Sec. 9663, Rev. C. 1907; re-en. Sec. 12381, R. C. M. 1921. Cal. Pen. C. Sec. 1510.

Cross-Reference

Inquest at coal mines, sec. 50-524.

Coroner Juror Serving as Trial Juror

Where the voir dire examination of a trial juror in a murder case failed to reveal the fact that he had served on the coroner's jury which had investigated the occurrence, known to the county attorney who directed proceedings at the inquest, and discovered by defense counsel after trial jury had been sworn, it was the duty of both to advise the trial court (sec. 94-7120, subd. 4) at the earliest opportunity to prevent a mistrial instead of remaining silent until verdict of guilty returned when defense counsel presented the matter in affidavits on motion for new trial. *State v. Allison*, 116 M 352, 364, 153 P 2d 141.

Introduction of Testimony at Trial

Where one charged with homicide, without knowledge of his constitutional rights against self-incrimination, art. III, sec. 18

of the constitution, and without being informed of his right to counsel, that he could refuse to testify, and that his statements might thereafter be used against him, was required to answer questions at the inquest put to him by the county attorney under the belief that he had to obey his orders, and the state at the trial in its case in chief introduced his entire testimony so given, the admission thereof was in violation of defendant's constitutional rights, necessitating reversal of the judgment of conviction. *State v. Allison*, 116 M 352, 355, 153 P 2d 141.

Defendant's admission at coroner's inquest that he drove at unlawful speed held admissible, as admission against interest, as part of plaintiff's case in chief. (See sec. 93-401-27, subd. 2.) *Marinkovich v. Tierney*, 93 M 72, 17 P 2d 93.

Nature of Proceeding

In holding an inquest the coroner acts judicially, and although an inquest is essentially a criminal proceeding, it is not a trial involving the merits of a prosecution but rather a preliminary investigation only. *State v. Allison*, 116 M 352, 355, 153 P 2d 141.

Coroners—10.

18 C.J.S. Coroners § 14.

13 Am. Jur. 108, Coroners, §§ 6 et seq.

When holding of inquest or autopsy justified. 48 ALR 1209.

94-201-2. (12382) Jurors to be sworn. When six or more of the jurors attend, they must be sworn by the coroner to inquire who the person was, and when, where, and by what means he came to his death, and into the circumstances attending his death; and to render a true verdict thereon, according to the evidence offered them, or arising from the inspection of the body.

History: En. Sec. 2791, Pen. C. 1895;
re-en. Sec. 9664, Rev. C. 1907; re-en. Sec.
12382, R. C. M. 1921. Cal. Pen. C. Sec.
1511.

Coroners ⇨ 12.
18 C.J.S. Coroners § 17.
13 Am. Jur. 112, 113, Coroners, §§ 11, 12.

94-201-3. (12383) Witnesses to be subpoenaed. A coroner may issue subpoenas for witnesses, returnable forthwith; or at such time and place as he may appoint, which may be served by any competent person. He must summon and examine as witnesses every person who, in his opinion, or that of any of the jury, has any knowledge of the facts, and may summon a surgeon or physician to inspect the body, and give a professional opinion as to the cause of the death.

History: En. Sec. 2792, Pen. C. 1895;
re-en. Sec. 9665, Rev. C. 1907; re-en. Sec.
12383, R. C. M. 1921. Cal. Pen. C. Sec.
1512.

Coroners ⇨ 13.
18 C.J.S. Coroners § 20.
13 Am. Jur. 110, Coroners, § 8.

94-201-4. (12384) Witness compelled to attend. A witness served with a subpoena may be compelled to attend and testify, or be punished by the coroner for disobedience in like manner as upon a subpoena issued by a justice of the peace.

History: En. Sec. 2793, Pen. C. 1895;
re-en. Sec. 9666, Rev. C. 1907; re-en. Sec.
12384, R. C. M. 1921. Cal. Pen. C. Sec.
1513.

13 Am. Jur. 113, Coroners, § 13.

94-201-5. (12385) Verdict of jury in writing, what to contain. After inspecting the body and hearing the testimony, the jury must render their verdict, and certify the same by an inquisition in writing, signed by them and setting forth who the person killed is, and when, where, and by what means he came to his death; and if he was killed, or his death occasioned by the act of another, by criminal means, who is guilty thereof.

History: En. Sec. 2794, Pen. C. 1895;
re-en. Sec. 9667, Rev. C. 1907; re-en. Sec.
12385, R. C. M. 1921. Cal. Pen. C. Sec.
1514.

Coroners ⇨ 18.
18 C.J.S. Coroners § 22.
13 Am. Jur. 112, 113, Coroners, §§ 11, 12.

94-201-6. (12386) Testimony in writing and where filed. The testimony of the witnesses examined before the coroner's jury must be reduced to writing by the coroner, or under his direction, and forthwith filed by him, with the inquisition, in the office of the clerk of the district court of the county.

History: En. Sec. 2795, Pen. C. 1895;
re-en. Sec. 9668, Rev. C. 1907; re-en. Sec.
12386, R. C. M. 1921. Cal. Pen. C. Sec.
1515.

testimony which was available for defendant's inspection for the desired information, held, denial of defendant's motion for a bill of particulars not an abuse of the court's discretion. *State v. Robinson*, 109 M 322, 327, 96 P 2d 265.

Where Transcript Available to Defendant, Not Error to Deny Him Bill of Particulars

Where an inquest had been held a year prior to prosecution for manslaughter for the killing of a pedestrian by reckless driving, the court could presume that the coroner had complied with the law under this section as to the transcript of the

References

State v. Belland, 59 M 540, 548, 197 P 841.

Coroners ⇨ 17.
18 C.J.S. Coroners § 23.

94-201-7. (12387) Exception. If, however, the person charged with the commission of the offense is arrested before the inquisition can be filed, the

coroner must deliver the same, with the testimony taken, to the magistrate before whom such person may be brought, who must return the same, with the depositions and statement taken before him, to the office of the clerk of the district court.

History: En. Sec. 2796, Pen. C. 1895;
re-en. Sec. 9669, Rev. C. 1907; re-en. Sec.
12387, R. C. M. 1921. Cal. Pen. C. Sec.
1516.

References

State v. Belland, 59 M 540, 548, 197 P
841.

94-201-8. (12388) Coroner to issue warrant, when. If the jury find that the person was killed by another, under circumstances not excusable or justifiable by law, or that his death was occasioned by the act of another by criminal means, and the party committing the act is ascertained by the inquisition, and is not in custody, the coroner must issue a warrant, signed by him, with his name of office, into one or more counties, as may be necessary for the arrest of the person charged.

History: En. Sec. 2797, Pen. C. 1895;
re-en. Sec. 9670, Rev. C. 1907; re-en. Sec.
12388, R. C. M. 1921. Cal. Pen. C. Sec.
1517.

Coroners 19.

18 C.J.S. Coroners § 24.

94-201-9. (12389) Inquest secret until after arrest. If the inquisition find a crime has been committed on the deceased, and name the person who the jury believes has committed it, the inquest shall not be made public until after the arrest, directed in the next section.

History: En. Sec. 2798, Pen. C. 1895;
re-en. Sec. 9671, Rev. C. 1907; re-en. Sec.
12389, R. C. M. 1921.

94-201-10. (12390) Warrant. If the person charged be present, the coroner may order his arrest, by an officer or any person, and must make a warrant requiring the officer or other person to take him before the most accessible magistrate of the county.

History: En. Sec. 2799, Pen. C. 1895;
re-en. Sec. 9672, Rev. C. 1907; re-en. Sec.
12390, R. C. M. 1921.

94-201-11. (12391) Same. If the person charged be not present, and the coroner believes he can be taken, the coroner may issue a warrant to the sheriff, or any constable of the county, requiring him to arrest the person and take him before a magistrate.

History: En. Sec. 2800, Pen. C. 1895;
re-en. Sec. 9673, Rev. C. 1907; re-en. Sec.
12391, R. C. M. 1921.

94-201-12. (12392) Form of warrant. The coroner's warrant must be substantially in the following form:

"County of

"The State of Montana to any sheriff, constable, marshal, or policeman of this state:

"An inquisition having been this day found by a coroner's jury before me, stating that A B has come to his death by the act of C D, by criminal means (or as the case may be, as found by the inquisition), you are there-

fore commanded forthwith to arrest the above named C D, and take him before the nearest or most accessible magistrate in this county.

"Given under my hand this day of, A. D. nineteen"

"E F, Coroner of the County of"

History: En. Sec. 2801, Pen. C. 1895; 12392, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9674, Rev. C. 1907; re-en. Sec. 1518.

94-201-13. (12393) How served. The coroner's warrant may be served in any county, and the officer serving it must proceed thereon, in all respects as upon a warrant of arrest on an information before a magistrate, except that when served in another county it need not be indorsed by a magistrate of that county.

History: En. Sec. 2802, Pen. C. 1895; 12393, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9675, Rev. C. 1907; re-en. Sec. 1519.

CHAPTER 301

SEARCH WARRANTS

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| 94-301-20. | Depositions, warrants, etc., to be returned by magistrate to district court. |
| 94-301-21. | Search of defendant in presence of magistrate. |

94-301-1. (12394) Search warrant defined. A search warrant is an order in writing, in the name of the state, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate.

History: Earlier acts relating to search warrants, differing materially from the present law, were Secs. 274-286, pp. 258-260, Bannack Stat.; re-en. Secs. 430-442, pp. 256, 257, Cod. Stat. 1871; re-en. Secs. 436-442, 3d Div. Rev. Stat. 1879; re-en. Secs. 432-444, 3d Div. Comp. Stat. 1887.

This section en. Sec. 2820, Pen. C. 1895; re-en. Sec. 9676, Rev. C. 1907; re-en. Sec. 12394, R. C. M. 1921. Cal. Pen. C. Sec. 1523.

Actions Which Do Not Lie Against Officer

Where a sheriff seized oil well piping under a search warrant and subsequently released it by order of the same justice of the peace to the custody from which he seized it, incidentally enabling the person who procured the warrant to take it, under claim of ownership, claim and delivery does not lie against sheriff on theory of wrongful and negligent loss of possession;

conversion does not lie where no facts are alleged that he instigated or assisted in the alleged wrongful taking; trespass and trespass on the case do not lie unless the injury is "proximate result" of sheriff's wrongful or negligent acts or defaults. *Harri v. Isaac*, 111 M 152, 156, 107 P 2d 137.

Consent to Search Without Warrant, Effect

One consenting to search of his premises without warrant cannot complain that it was illegal. *State v. Uotila*, 71 M 351, 229 P 724.

Id. After officers stated they desired to look over defendant's place, defendant's statement, "All right; go ahead" held to warrant conclusion that search was with defendant's permission.

Consent of owner, freely given on officers' request, is not an "unreasonable search". *U. S. v. Williams*, 295 F 219.

Nature and Necessity

The process of search and seizure may be invoked only in furtherance of public prosecution. *State v. District Court*, 70 M 191, 224 P 862.

Id. Search, unlawful at inception, does not become lawful by what is found.

The issuance of a search warrant by the district court is a judicial proceeding. *State v. Tesla et al.*, 69 M 503, 223 P 107.

Operation and Effect

The general provisions of sections 94-301-1 to 94-301-21, with reference to the issuance of search warrants, were not amended or modified by the provisions of the Prohibition Enforcement Act. *State v. Tesla et al.*, 69 M 503, 509, 223 P 107.

Search and Seizure on Arrest, or When Offense Believed Being Committed

Where defendant was arrested in bed for attempt to maim livestock, his shoes, gun, and shells, being in plain sight, were properly seized by officer as incident to arrest (const. art. III, sec. 7). *State v. Benson*, 91 M 21, 5 P 2d 223.

An officer may make a search and seizure without a warrant when he has probable cause to believe that an offense is being committed. *State ex rel. Wong You v. District Court*, 106 M 347, 352, 78 P 2d 353.

Unreasonable Searches and Seizures

Peace officers should be encouraged, but evidence of crime must be lawfully obtained (const. amend. 4). *U. S. v. Clark*, 18 F 2d 442.

In a prosecution for murder, the admission of evidence that shoes taken from defendant without his consent corresponded with tracks found near the scene of the killing, did not deprive defendant of the rights guaranteed to him by const. art. III, sec. 7, prohibiting unreasonable searches and seizures. *State v. Fuller*, 34 M 12, 85 P 369.

The protection granted by const. art. III, sec. 7, from unreasonable searches and seizures reaches all alike, whether accused of crime, or not, and the duty of enforcing it is obligatory upon all intrusted with the enforcement of the law. *State v. District Court*, 70 M 191, 224 P 862.

Id. Searches and seizures which are not lawful and which are not conducted as the law prescribes are unreasonable within const. art. III, sec. 7 (See also *State ex rel. Sadler v. District Court*, 70 M 378, 225 P 1000). *State v. Mullaney*, 92 M 553, 16 P 2d 407.

Constitutional provision against unreasonable search and seizure applies to person and baggage and personal belongings, and in search of person unlawfully arrested and seizure of his personal belongings. *State v. Mullaney*, 92 M 553, 16 P 2d 407.

An arrest, or search and seizure, made without a warrant is illegal and, therefore, unreasonable when it is made upon mere suspicion or belief unsupported by facts, circumstances or credible information calculated to produce such belief. *State ex rel. Wong You v. District Court*, 106 M 347, 354, 78 P 2d 353.

References

State ex rel. Samlin v. District Court, 59 M 600, 606 et seq., 198 P 362; *State v. Certain Intoxicating Liquors*, 71 M 79, 86, 227 P 472; *State v. English*, 71 M 343, 346, 229 P 727; *State ex rel. Marquette v. Police Court*, 86 M 297, 312, 283 P 430.

Searches and Seizures ⇨ 3 (1).

56 C.J. Searches and Seizures § 3.

47 Am. Jur. 511, Searches and Seizures, §§ 14 et seq.

94-301-2. (12395) Upon what ground it may issue. It may be issued upon either of the following grounds:

1. When the property was stolen or embezzled; in which case it may be taken on the warrant, from any place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

2. When it was used as the means of committing a felony; in which case it may be taken on the warrant from the place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

3. When it is in the possession of any person with the intent to use it as the means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered; in which case it may be taken on the warrant from such person, or from any place occupied by him or under his control, or from the possession of the person to whom he may have so delivered it.

History: En. Sec. 2821, Pen. C. 1895; re-en. Sec. 9677, Rev. C. 1907; re-en. Sec. 12395, R. C. M. 1921. Cal. Pen. C. Sec. 1524.

Cross-References

Complaint against pawnbrokers or junk dealers, sec. 66-1602.

Liquor control act, issuance, sec. 4-208.

Maliciously procuring search warrant, penalty, sec. 94-35-122

Narcotic drugs, issuance for, secs. 54-112, 54-113.

Operation and Effect

Violations of city ordinance are not included within the meaning of the expression "public offense," as those words are used in this section. State ex rel. Streit v. Justice Court, 45 M 375, 381, 123 P 405.

The use of search warrants is not to be extended by construction to any case not clearly covered by the statute. State ex rel. Streit v. Justice Court, 45 M 375, 382, 123 P 405.

94-301-3. (12396) It cannot be issued but upon probable cause. A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched.

History: En. Sec. 2822, Pen. C. 1895; re-en. Sec. 9678, Rev. C. 1907; re-en. Sec. 12396, R. C. M. 1921. Cal. Pen. C. Sec. 1525.

Description of Persons, Places and Property

A search warrant as to the description of the premises to be searched must be complete in itself. State v. District Court, 70 M 191, 224 P 862.

Id. A warrant must designate the premises to be searched and contain a description so specific as to avoid any unauthorized invasion of the right of privacy, and must identify the property in such manner as to leave to the officer no discretion as to the premises to be

The alleged threatened violation of a town ordinance, by conducting a saloon without first obtaining a license, does not justify the issuance of a search warrant commanding that a designated building be searched for intoxicating liquors. State ex rel. Streit v. Justice Court, 45 M 375, 382, 123 P 405.

References

Cited or applied as section 2821, Penal Code, in State ex rel. Geyman v. District Court, 26 M 483, 486, 68 P 861; State ex rel. Samlin v. District Court, 59 M 600, 606 et seq., 198 P 362; State v. Tesla et al., 69 M 503, 509, 223 P 107; State v. Certain Intoxicating Liquors, 71 M 79, 86, 227 P 472; State v. English, 71 M 343, 346, 229 P 727; State ex rel. Marquette v. Police Court, 86 M 297, 312, 283 P 430.

Searches and Seizures—3 (1).

56 C.J. Searches and Seizures § 71 et seq.

searched. There must be no obscurity nor uncertainty.

Description of place to be searched as ranch with small buildings, located about five miles in westerly direction from town named, held insufficient. Fall v. U. S., 33 F 2d 71.

"Probable Cause"

A search warrant issued on a conclusion of the applicant, without any facts stated in the application on which the judicial officer to whom it is addressed may form his own conclusion, is not a showing of "probable cause supported by oath or affirmation", within the meaning of const. Mont. art. III, sec. 7. State v. District Court, 59 M 600, 198 P 362.

The circumstances justifying issuance of a search warrant must create a reasonable belief that probable cause exists, and must be as strong as those which would warrant the institution of a criminal charge for an arrest on such charge without warrant. *State v. District Court*, 71 M 125, 227 P 576.

An application for a search warrant must set forth sufficient facts to enable a judicial officer to see that probable cause for its issuance exists. *State v. District Court*, 70 M 202, 224 P 866; *State v. District Court*, 75 M 476, 244 P 280.

Evidence held to establish probable cause for search and seizure. In re *Herter*,

30 F 2d 968, modified (C. C. A.) 33 F 2d 400.

References

State ex rel. Samlin v. District Court, 59 M 600, 606 et seq., 198 P 362; *State v. Tesla et al.*, 69 M 503, 223 P 107; *State v. Certain Intoxicating Liquors*, 71 M 79, 86, 227 P 472; *State v. English*, 71 M 343, 346, 229 P 727; *State v. Rice*, 73 M 272, 235 P 716.

Searches and Seizures ¶3 (4).

56 C.J. *Searches and Seizures* § 114.

47 Am. Jur. 515, *Searches and Seizures*, §§ 21 et seq.

94-301-4. (12397) Magistrates must examine on oath, complainant, etc.

The magistrate must, before issuing the warrant, examine on oath the complainant, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

History: En. Sec. 2823, Pen. C. 1895; re-en. Sec. 9679, Rev. C. 1907; re-en. Sec. 12397, R. C. M. 1921. Cal. Pen. C. Sec. 1526.

Operation and Effect

Where probable cause for the issuance of a search warrant was shown by the deposition of the complainant, disclosing time, place and manner of an alleged violation of the liquor law, the requirements of this section and the following section were sufficiently complied with, and the fact that the complaint for the warrant did not set forth the time of the commission of the offense did not render the warrant illegal. *State v. Tesla et al.*, 69 M 503, 509, 223 P 107.

To obtain a search warrant under the liquor laws, the facts upon which its issuance is sought must be stated under oath and be sufficient to enable the magistrate to whom application is made to determine the existence of probable cause without reference to the opinion of the applicant. *State v. District Court et al.*, 71 M 125, 219 et seq., 227 P 576.

Where a deputy county attorney had presented a verified complaint for a search warrant based upon the affidavit of another, and the district judge examined the latter under oath, the fact that he did not also examine the complainant himself, as required by this section, did not render the warrant illegal, since the only information the complainant had was that obtained from the affiant and an examina-

tion of the former would have been useless. *State v. English*, 71 M 343, 345, 346, 229 P 727.

Id. This section declares that a magistrate before issuing a search warrant must take the deposition of any witness in writing. The warrant was issued upon an affidavit. Held, that the departure did not render the warrant illegal, the words "deposition" and "affidavit" having been used interchangeably in the chapter of the Codes relating to search warrants.

Test for Sufficiency of Affidavit

Test to determine whether affidavit for search warrant states facts sufficient to justify its issuance is whether affiant could be prosecuted for perjury (sec. 94-3801) if the statement is false. *State v. District Court*, 75 M 476, 244 P 280.

Id. Affidavit stating only conclusions is insufficient.

References

State ex rel. Samlin v. District Court, 59 M 600, 606 et seq., 198 P 362; *State ex rel. King v. District Court et al.*, 70 M 191, 194, 224 P 862; *State ex rel. Thibodeau v. District Court*, 70 M 202, 204, 224 P 866; *State v. Certain Intoxicating Liquors*, 71 M 79, 86, 227 P 472.

Searches and Seizures ¶3 (2).

56 C.J. *Searches and Seizures* § 107 et seq.

47 Am. Jur. 520, *Searches and Seizures*, § 30.

94-301-5. (12398) Deposition, what to contain. The deposition must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist

History: En. Sec. 2824, Pen. C. 1895; 12398, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9680, Rev. C. 1907; re-en. Sec. 1527.

Operation and Effect

Where probable cause for the issuance of a search warrant was shown by the deposition of the complainant, disclosing time, place and manner of an alleged violation of the liquor law, the requirements of section 94-301-4 and this section were sufficiently complied with, and the fact that the complaint for the warrant did not set forth the time of the commission of the offense did not render the warrant illegal. *State v. Tesla et al.*, 69 M 503, 509, 223 P 107.

References

Cited or applied as section 2824, Penal Code, in *State ex rel. Geyman v. District Court*, 26 M 483, 486, 68 P 861; *State ex rel. Samlin v. District Court*, 59 M 600, 606 et seq., 198 P 362; *State ex rel. King v. District Court et al.*, 70 M 191, 194, 224 P 862; *State v. Certain Intoxicating Liquors*, 71 M 79, 86, 227 P 472; *State v. English*, 71 M 343, 346, 229 P 727.

94-301-6. (12399) When to issue warrant. If the magistrate is thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the magistrate.

History: En. Sec. 2825, Pen. C. 1895; re-en. Sec. 9681, Rev. C. 1907; re-en. Sec. 12399, R. C. M. 1921. Cal. Pen. C. Sec. 1528.

References

State ex rel. Samlin v. District Court, 59 M 600, 606 et seq., 198 P 362; *State v. Tesla et al.*, 69 M 503, 509, 223 P 107.

94-301-7. (12400) Form of warrant. The warrant must be in substantially the following form:

"County of

"The State of Montana to any sheriff, constable, marshal, or policeman, in the county of

"Proof, by affidavit, having been this day made before me, by (naming every person whose affidavit has been taken) that (stating the grounds of the application, according to section 94-301-3, or if the affidavit be not positive that there is probable cause for believing), that (stating the grounds of the application in the same manner), you are therefore commanded in the daytime (or at any time of the day or night, as the case may be, according to section 94-301-11), to make immediate search on the person of C D, or in the house situated (describing it or any other place to be searched, with reasonable particularity, as the case may be) for the following property (describing it with reasonable particularity); and if you find the same or any part thereof, to bring it forthwith before me at (stating the place).

"Given under my hand, and dated this day of, A. D. nineteen

"E F, Justice of the Peace" (or as the case may be).

History: En. Sec. 2826, Pen. C. 1895; re-en. Sec. 9682, Rev. C. 1907; re-en. Sec. 12400, R. C. M. 1921. Cal. Pen. C. Sec. 1529.

References

Cited or applied as section 9682, Revised

Codes, in *State v. Kelly et al.*, 57 M 123, 129, 187 P 637.

Searches and Seizures § 3 (5, 6, 8).
56 C.J. Searches and Seizures §§ 107 et seq., 121, 129 et seq.
47 Am. Jur. 520, Searches and Seizures, §§ 31 et seq.

94-301-8. (12401) By whom served. A search warrant may in all cases be served by any of the officers mentioned in its directions, but by no other

person, except in aid of the officer on his requiring it, he being present and acting in its execution.

History: En. Sec. 2827, Pen. C. 1895; 56 C.J. Searches and Seizures § 157 et
re-en. Sec. 9683, Rev. C. 1907; re-en. Sec. seq.
12401, R. C. M. 1921. Cal. Pen. C. Sec. 1530. 47 Am. Jur. 525, Searches and Seizures,
§§ 39 et seq.
Searches and Seizures 3 (9).

94-301-9. (12402) Officer may break open door, etc., to execute warrant. The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

History: En. Sec. 2828, Pen. C. 1895; Code, in State ex rel. Geyman v. District
re-en. Sec. 9684, Rev. C. 1907; re-en. Sec. Court, 26 M 483, 486, 68 P 861.
12402, R. C. M. 1921. Cal. Pen. C. Sec. 1531.

References

Cited or applied as section 2828, Penal

47 Am. Jur. 526, Searches and Seizures,
§ 41.

94-301-10. (12403) May break open door, etc., to liberate person acting in his aid. He may break open any outer or inner door or window of a house, for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

History: En. Sec. 2829, Pen. C. 1895; 12403, R. C. M. 1921. Cal. Pen. C. Sec.
re-en. Sec. 9685, Rev. C. 1907; re-en. Sec. 1532.

94-301-11. (12404) When warrant may be served in the night. The magistrate must insert a direction in the warrant that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night.

History: En. Sec. 2830, Pen. C. 1895; 47 Am. Jur. 536, Searches and Seizures,
re-en. Sec. 9686, Rev. C. 1907; re-en. Sec. § 40.
12404, R. C. M. 1921. Cal. Pen. C. Sec. 1533.

94-301-12. (12405) Within what time warrant must be executed. A search warrant must be executed and returned to the magistrate who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void.

History: En. Sec. 2831, Pen. C. 1895; 12405, R. C. M. 1921. Cal. Pen. C. Sec.
re-en. Sec. 9687, Rev. C. 1907; re-en. Sec. 1534.

94-301-13. (12406) Officer to give receipt for property taken. When the officer takes the property under the warrant, he must give a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property.

History: En. Sec. 2832, Pen. C. 1895; 12406, R. C. M. 1921. Cal. Pen. C. Sec.
re-en. Sec. 9688, Rev. C. 1907; re-en. Sec. 1535.

94-301-14. (12407) Property, how disposed of. When the property is delivered to the magistrate, he must, if it was stolen or embezzled, dispose of it as provided in sections 94-9702 to 94-9707, inclusive. If it was taken on

a warrant issued on the grounds stated in the second and third subdivisions of section 94-301-2, he must retain it in his possession, subject to the order of the court to which he is required to return the proceedings before him, or to any other court in which the offense, in respect to which the property taken, is triable.

History: En. Sec. 2833, Pen. C. 1895; re-en. Sec. 9689, Rev. C. 1907; re-en. Sec. 12407, R. C. M. 1921. Cal. Pen. C. Sec. 1536.

References

State v. Certain Intoxicating Liquors, 71 M 79, 87, 227 P 472.

Searches and Seizures 5.

56 C.J. Searches and Seizures § 218 et seq.

47 Am. Jur. 529, Searches and Seizures, §§ 48, 49.

94-301-15. (12408) Sale of property when a living animal or of perishable nature. If the property thus obtained be a living animal or be of a perishable nature, the court or magistrate authorized to order a restoration may order a sale thereof, and the proceeds shall be applied in the same manner as hereinbefore directed in respect to such property.

History: En. Sec. 2834, Pen. C. 1895; re-en. Sec. 9690, Rev. C. 1907; re-en. Sec. 12408, R. C. M. 1921.

94-301-16. (12409) Return of warrant and inventory of property. The officer must forthwith return the warrant to the magistrate, and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and of the applicant for the warrant, if they are present, verified by the affidavit of the officer at the foot of the inventory, and taken before the magistrate at the time, to the following effect: "I, R S, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."

History: En. Sec. 2835, Pen. C. 1895; re-en. Sec. 9691, Rev. C. 1907; re-en. Sec. 12409, R. C. M. 1921. Cal. Pen. C. Sec. 1537.

References

State v. Certain Intoxicating Liquors, 71 M 79, 87, 227 P 472.

Searches and Seizures 3 (9).

56 C.J. Searches and Seizures § 165 et seq.

47 Am. Jur. 527, Searches and Seizures, §§ 43, 44.

94-301-17. (12410) Copy of inventory, to whom delivered. The magistrate must thereupon, if required, deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant.

History: En. Sec. 2836, Pen. C. 1895; re-en. Sec. 9692, Rev. C. 1907; re-en. Sec. 12410, R. C. M. 1921. Cal. Pen. C. Sec. 1538.

94-301-18. (12411) Proceedings if grounds of warrant are controverted. If the grounds upon which the warrant was issued be controverted, he must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated in the same manner as prescribed in section 94-6111.

History: En. Sec. 2837, Pen. C. 1895; re-en. Sec. 9693, Rev. C. 1907; re-en. Sec. 12411, R. C. M. 1921. Cal. Pen. C. Sec. 1539.

Searches and Seizures 3 (2).

56 C.J. Searches and Seizures § 107 et seq.

94-301-19. (12412) Property, when to be restored. If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken.

History: En. Sec. 2838, Pen. C. 1895; 12412, R. C. M. 1921. Cal. Pen. C. Sec. re-en. Sec. 9694, Rev. C. 1907; re-en. Sec. 1540.

94-301-20. (12413) Depositions, warrants, etc., to be returned by magistrate to district court. The magistrate must annex together the depositions, search warrant, and return, and the inventory, and return them to the next term or session of the district court having power to inquire into the offenses in respect to which the search warrant was issued, at or before its opening on the first day.

History: En. Sec. 2839, Pen. C. 1895; al., 70 M 191, 194, 224 P 862; State ex re-en. Sec. 9695, Rev. C. 1907; re-en. Sec. rel. Thibodeau v. District Court, 70 M 202, 12413, R. C. M. 1921. Cal. Pen. C. Sec. 205, 224 P 866; State v. Certain Intoxicating Liquors, 71 M 79, 86, 227 P 472; State v. English, 71 M 343, 346, 229 P 727.

References

State ex rel. King v. District Court et

94-301-21. (12414) Search of defendant in presence of magistrate. When a person charged with a felony is supposed by the magistrate before whom he is brought to have on his person a dangerous weapon, or anything which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or other thing to be retained, subject to his order, or to the order of the court in which the defendant may be tried.

History: En. Sec. 2840, Pen. C. 1895; person arresting may take from the possession of the arrestee articles of property which reasonably would be of use on the trial. State ex rel. Wong You v. District Court, 106 M 347, 351, 78 P 2d 353.

Taking of Articles upon Arrest

When an arrest is lawfully made, the

CHAPTER 401

REWARD FOR APPREHENSION OF FUGITIVES FROM JUSTICE AND PERSONS COMMITTING ROBBERY ON CERTAIN CONVEYANCES

Section 94-401-1. Rewards for the apprehension of fugitives from justice.

94-401-2. Standing reward.

94-401-3. Payment of reward.

94-401-1. (12415) Rewards for the apprehension of fugitives from justice. The governor may offer a reward not exceeding one thousand dollars, payable out of the general fund, for the apprehension—

1. Of any convict who has escaped from the state prison; or,
2. Of any person who has committed, or is charged with the commission of a felony.

History: En. Sec. 2850, Pen. C. 1895; re-en. Sec. 9697, Rev. C. 1907; re-en. Sec. 12415, R. C. M. 1921. Cal. Pen. C. Sec. 1547.

Rewards—4.

54 C.J. Rewards § 7 et seq.

46 Am. Jur. 105, Rewards, generally.

94-401-2. (12416) Standing reward. The governor must offer a standing reward of three hundred dollars for the arrest of any person engaged in the robbery of, or in an attempt to rob, any person or persons upon, or having in charge, in whole or in part, any stage coach, wagon, railroad train, or other conveyance, engaged at the time in carrying passengers; or any private conveyance within this state, the reward to be paid to the person making the arrest, immediately upon the conviction of the person arrested; but no reward shall be paid except after such conviction.

History: En. Sec. 2851, Pen. C. 1895; re-en. Sec. 9698, Rev. C. 1907; re-en. Sec. 12416, R. C. M. 1921. Cal. Pen. C. Sec. 1547.

References

Cited or applied as section 287, Fourth Division Compiled Statutes 1887, in *State v. Cook*, 13 M 465, 34 P 770.

94-401-3. (12417) Payment of reward. When a person apprehends and delivers to the proper sheriff or officer the person for whose apprehension a reward is offered, he must take his certificate of such delivery, and the governor, on the production of such certificate, must certify the amount of the claim to the auditor.

History: Ap. p. Sec. 458, p. 259, Cod. Stat. 1871; re-en. Sec. 458, 3d Div. Rev. Stat. 1879; re-en. Sec. 460, 3d Div. Comp. Stat. 1887; amd. Sec. 2852, Pen. C. 1895; re-en. Sec. 9698, Rev. C. 1907; re-en. Sec. 12417, R. C. M. 1921.

Rewards—13.

54 C.J. Rewards § 71 et seq.

46 Am. Jur. 120, Rewards, § 26.

CHAPTER 501

UNIFORM CRIMINAL EXTRADITION ACT

Section 94-501-1.	Definitions.
94-501-2.	Fugitives from justice—duty of governor.
94-501-3.	Demand—form.
94-501-4.	Investigation by governor.
94-501-5.	Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.
94-501-6.	Extradition of persons not present in demanding state at time of commission of crime.
94-501-7.	Issuance of warrant of arrest by governor—recitals therein.
94-501-8.	Execution of warrant—manner and place thereof.
94-501-9.	Authority of arresting officer.
94-501-10.	Rights of accused person—application for writ of habeas corpus.
94-501-11.	Penalty for noncompliance with preceding section.
94-501-12.	Confinement of accused in jail when necessary.
94-501-13.	Arrest of accused before making of requisition.
94-501-14.	Arrest of accused without warrant therefor.
94-501-15.	Commitment to await requisition—bail.
94-501-16.	Bail—in what cases—conditions of bond.
94-501-17.	Extension of time of commitment adjournment.
94-501-18.	Bail—when forfeited.
94-501-19.	Persons under criminal prosecution in this state at time of requisition.
94-501-20.	Guilt or innocence of accused, when inquired into.
94-501-21.	Alias warrant of arrest.
94-501-22.	Fugitives from this state—duty of governors.
94-501-23.	Application for issuance of requisition—by whom made—contents.
94-501-24.	Fugitives from this state—accounts.
94-501-25.	No fee to be paid to public officer procuring surrender.
94-501-26.	Receiving fee for services in arresting fugitives.
94-501-27.	Immunity from service of process in certain civil actions.
94-501-28.	Written waiver of extradition proceedings.
94-501-29.	Nonwaiver by this state.

- 94-501-30. No immunity from other criminal prosecutions while in this state.
 94-501-31. Interpretation.
 94-501-32. Short title.

94-501-1. Definitions. Where appearing in this act, the term "governor" includes any person performing the functions of governor by authority of the law of this state. The term "executive authority" includes the governor, and any person performing the functions of governor in a state other than this state. The term "state", referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America.

History: En. Sec. 1, Ch. 190, L. 1937.

NOTE.—Uniform State Law. Sections 94-501-1 through 94-501-32 constitute the "Uniform Criminal Extradition Act" approved by the National Conference of Commissioners on Uniform State Laws in 1937 and adopted in the states of Alabama, Arizona, Arkansas, California, Delaware, Florida, Idaho, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming and also in the territory of Hawaii.

Extradition \hookrightarrow 30.

35 C.J.S. Extradition § 10.

22 Am. Jur. 241, Extradition.

Right to delay of one arrested on extradition warrant to enable him to present evidence that he is not subject to extradition. 11 ALR 1410.

Right to prove alibi or absence from demanding state. 51 ALR 797.

Bar of limitations as proper subject of investigation in habeas corpus proceedings for release of one sought to be extradited. 77 ALR 902.

Motive or ulterior purpose of officials demanding or granting extradition as proper subject of inquiry on habeas corpus. 94 ALR 1496.

Sanity or insanity or pendency of lunacy proceedings as matters for consideration in extradition proceedings. 114 ALR 693.

Demanding papers in extradition proceedings as making out prima facie case of habeas corpus proceeding that accused was present in demanding state at time of commission of alleged crime or that he is a fugitive. 135 ALR 973.

94-501-2. Fugitives from justice—duty of governor. Subject to the provisions of this act, the provisions of the constitution of the United States controlling, and any and all acts of congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

History: En. Sec. 2, Ch. 190, L. 1937.

94-501-3. Demand—form. No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, except in cases arising under section 94-501-6, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate

must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand.

History: En. Sec. 3, Ch. 190, L. 1937.

94-501-4. Investigation by governor. When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

History: En. Sec. 4, Ch. 190, L. 1937.

94-501-5. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion. When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

The governor of this state may also surrender on demand of the governor of any other state any person in this state who is charged in the manner provided in section 94-501-23 with having violated the laws of the state whose governor is making the demand, even though such person left the demanding state involuntarily.

History: En. Sec. 5, Ch. 190, L. 1937.

94-501-6. Extradition of persons not present in demanding state at time of commission of crime. The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 94-501-3 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this act not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.

History: En. Sec. 6, Ch. 190, L. 1937.

94-501-7. Issuance of warrant of arrest by governor—recitals therein. If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

History: En. Sec. 7, Ch. 190, L. 1937.

94-501-8. Execution of warrant—manner and place thereof. Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this act to the duly authorized agent of the demanding state.

History: En. Sec. 8, Ch. 190, L. 1937.

94-501-9. Authority of arresting officer. Every such peace officer or other person empowered to make the arrest, shall have the same authority, in arresting the accused, to command assistance therein, as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

History: En. Sec. 9, Ch. 190, L. 1937.

94-501-10. Rights of accused person—application for writ of habeas corpus. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

History: En. Sec. 10, Ch. 190, L. 1937.

94-501-11. Penalty for noncompliance with preceding section. Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in wilful disobedience to the last section, shall be guilty of a misdemeanor and, on conviction, shall be fined not more than \$1,000.00 or be imprisoned not more than six months, or both.

History: En. Sec. 11, Ch. 190, L. 1937.

94-501-12. Confinement of accused in jail when necessary. The officer or persons executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person, however, being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for

the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping; provided, however, that such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state.

History: En. Sec. 12, Ch. 190, L. 1937.

94-501-13. Arrest of accused before making of requisition. Whenever any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state, and, except in cases arising under section 94-501-6 with having fled from justice, or, with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under section 94-501-6, has fled from justice, or with having been convicted of a crime in that state and having escaped from bail, probation or parole and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

History: En. Sec. 13, Ch. 190, L. 1937.

94-501-14. Arrest of accused without warrant therefor. The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.

History: En. Sec. 14, Ch. 190, L. 1937.

94-501-15. Commitment to await requisition—bail. If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged, and, except in

cases arising under section 94-501-6, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time not exceeding thirty days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section, or until he shall be legally discharged.

History: En. Sec. 15, Ch. 190, L. 1937.

94-501-16. Bail—in what cases—conditions of bond. Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond or undertaking, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond or undertaking, and for his surrender, to be arrested upon the warrant of the governor of this state.

History: En. Sec. 16, Ch. 190, L. 1937.

94-501-17. Extension of time of commitment adjournment. If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant, bond, or undertaking, a judge or magistrate may discharge him or may recommit him for a further period of sixty (60) days, or a supreme court justice or county judge may again take bail for his appearance and surrender, as provided in section 94-501-16, but within a period not to exceed sixty (60) days after the date of such new bond or undertaking.

History: En. Sec. 17, Ch. 190, L. 1937.

94-501-18. Bail—when forfeited. If the prisoner is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within this state. Recovery may be had on such bond in the name of the state as in the case of other bonds or undertakings given by the accused in criminal proceedings within this state.

History: En. Sec. 18, Ch. 190, L. 1937.

94-501-19. Persons under criminal prosecution in this state at time of requisition. If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.

History: En. Sec. 19, Ch. 190, L. 1937.

94-501-20. Guilt or innocence of accused, when inquired into. The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it

may be involved in identifying the person held as the person charged with the crime.

History: En. Sec. 20, Ch. 190, L. 1937.

94-501-21. Alias warrant of arrest. The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

History: En. Sec. 21, Ch. 190, L. 1937.

94-501-22. Fugitives from this state—duty of governors. Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state, from the chief executive of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

History: En. Sec. 22, Ch. 190, L. 1937.

94-501-23. Application for issuance of requisition—by whom made—contents. I. When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged, in which the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein at the time the application is made and certifying that, in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

II. When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

III. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the

governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information, and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition.

History: En. Sec. 23, Ch. 190, L. 1937.

94-501-24. Fugitives from this state—accounts. When the governor of this state, in the exercise of the authority conferred by section 2, article IV, of the constitution of the United States, or by the laws of this state, demands from the executive authority of any state of the United States, or of any foreign government, the surrender to the authorities of this state of a fugitive from justice, who has been found and arrested in such state or foreign government, the accounts of the person employed by him to bring back such fugitive must be audited by the board of examiners, and paid out of the state treasury.

History: En. Sec. 24, Ch. 190, L. 1937.

94-501-25. (12428) No fee to be paid to public officer procuring surrender. No compensation, fee or reward of any kind can be paid to or received by a public officer of this state, or other person, for a service rendered in procuring from the governor the demand mentioned in section 94-501-24 or for the surrender of the fugitive or for conveying him to this state, or detaining him therein, except as provided for in such section.

History: En. Sec. 2863, Pen. C. 1895; 12428, R. C. M. 1921; amd. Sec. 1, Ch. 38, re-en. Sec. 9710, Rev. C. 1907; re-en. Sec. L. 1947. Cal. Pen. C. Sec. 1558.

94-501-26. (10919) Receiving fee for services in arresting fugitives. Every person who violates any of the provisions of section 94-501-25 is guilty of a misdemeanor.

History: En. Sec. 273, Pen. C. 1895; re-en. Sec. 8255, Rev. C. 1907; re-en. Sec. 10919, R. C. M. 1921. Cal. Pen. C. Sec. 144.

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35 C.J.S. Extradition § 23.

94-501-27. Immunity from service of process in certain civil actions. A person brought into this state on, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceeding to answer which he is being or has been returned, until he has been convicted in the criminal proceeding, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

History: En. Sec. 25, Ch. 190, L. 1937.

94-501-28. Written waiver of extradition proceedings. Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in sections 94-501-7 and 94-501-8 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; provided, however, that before such waiver shall be executed or subscribed by such person it

shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in section 94-501-10.

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent; provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this state.

History: En. Sec. 25-A, Ch. 190, L. 1937.

94-501-29. Nonwaiver by this state. Nothing in this act contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for crime committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, a sentence or punishment for any crime committed within this state, nor shall any proceedings had under this act which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdiction in any way whatsoever.

History: En. Sec. 25-B, Ch. 190, L. 1937.

94-501-30. No immunity from other criminal prosecutions while in this state. After a person has been brought back to this state by extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition.

History: En. Sec. 26, Ch. 190, L. 1937.

94-501-31. Interpretation. The provisions of this act shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it.

History: En. Sec. 27, Ch. 190, L. 1937.

94-501-32. Short title. This act may be cited as the Uniform Criminal Extradition Act.

History: En. Sec. 30, Ch. 190, L. 1937.

CHAPTER 601

MISCELLANEOUS PROVISIONS RESPECTING SPECIAL PROCEEDINGS OF A CRIMINAL NATURE

- Section 94-601-1. Parties to special proceedings, how designated.
 94-601-2. Entitling affidavits.
 94-601-3. Subpoenas.

94-601-1. (12429) Parties to special proceedings, how designated. The party prosecuting a special proceeding of a criminal nature is designated in this code as the complainant, and the adverse party as the defendant.

History: En. Sec. 2890, Pen. C. 1895; designation for a petitioner in a habeas corpus proceeding. State ex rel. Jackson v. Kennie, 24 M 45, 50, 60 P 589.
re-en. Sec. 9711, Rev. C. 1907; re-en. Sec. 12429, R. C. M. 1921. Cal. Pen. C. Sec. 1562.

Operation and Effect Statutes⇒199.
The term "defendant" is not a proper 59 C.J. Statutes § 587.

94-601-2. (12430) Entitling affidavits. The provisions of section 94-6433, in respect to entitling affidavits, are applicable to such proceedings.

History: En. Sec. 2891, Pen. C. 1895;
re-en. Sec. 9712, Rev. C. 1907; re-en. Sec. 12430, R. C. M. 1921. Cal. Pen. C. Sec. 1563.

94-601-3. (12431) Subpoenas. The courts or magistrates before whom such proceedings are prosecuted, may issue subpoenas for witnesses, and punish their disobedience in the same manner as in a criminal action.

History: En. Sec. 2892, Pen. C. 1895; Witnesses⇒8.
re-en. Sec. 9713, Rev. C. 1907; re-en. Sec. 70 C.J. Witnesses § 22 et seq.
12431, R. C. M. 1921. Cal. Pen. C. Sec. 1564.

CHAPTER 701

PRISONER'S ATTENDANCE AT COURT—HOW OBTAINED

Section 94-701-1. Persons imprisoned in state prison or in another county, how brought before a court.

94-701-1. (12432) Persons imprisoned in state prison or in another county, how brought before a court. When it is necessary to have a person imprisoned in the state prison brought before any court, or a person imprisoned in a county jail brought before a court sitting in another county, an order for that purpose may be made by the court, and executed by the sheriff of the county where it is made.

History: En. Sec. 2900, Pen. C. 1895; Prisons⇒13.
re-en. Sec. 9714, Rev. C. 1907; re-en. Sec. 50 C.J. Prisons § 38 et seq.
12432, R. C. M. 1921. Cal. Pen. C. Sec. 1567.

CHAPTER 801

FINES AND FORFEITURES—DISPOSAL OF

Section 94-801-1. Fines, costs and forfeitures, how disposed of.

94-801-1. (12433) Fines, costs and forfeitures, how disposed of. All fines and forfeitures collected in any court, except police courts, must be applied to the payment of the costs of the case in which the fine is imposed or the forfeiture incurred; and after such costs are paid, the residue must be paid to the county treasurer of the county in which the court is held and if not otherwise provided by law, by him credited to the general school fund of said county; and at the time of payment of any such fine or forfeiture there shall be filed with the county treasurer, a complete statement showing the total of the fine or forfeiture received or incurred with an itemized

statement of the costs incurred by the county in such action, which statement shall give the title of the cause and be subscribed by the person or officer making such payment.

History: En. Sec. 2910, Pen. C. 1895; re-en. Sec. 9715, Rev. C. 1907; re-en. Sec. 12433, R. C. M. 1921; amd. Sec. 1, Ch. 83, L. 1923. Cal. Pen. C. Sec. 1570.

Operation and Effect

This section is applicable to contempt proceedings, and costs incurred therein must be paid from any fine imposed. State ex rel. Flynn v. District Court, 24 M 33, 36, 60 P 493. See also Dunlavey v. Doggett, 38 M 204, 209, 99 P 436.

In an action on a bail bond in the form prescribed by section 94-8717, running to the state and not the county is the proper party plaintiff, though, under this section, the money recovered goes to the county and not to the state. County of Wheatland v. Van et al., 64 M 113, 116, 207 P 1003.

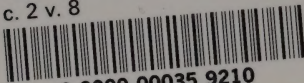
Fines ~~20~~; Forfeiture ~~10~~.

36 C.J.S. Fines § 19; 37 C.J.S. Forfeitures §§ 8, 9.

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